

1589

Modern Reports :

O R,

MODERN CASES

I N

Law and Equity.

I n T W O P A R T S.

P A R T I.

Cases in the King's Bench,

From the Eighth to the Twelfth Years of KING GEORGE I.

P A R T II.

Cases in Chancery.

To which are added

Some Special CASES on APPEALS.

VOLUMES VIII, IX.

The SECOND EDITION, altered and much improved from many Errors in the former, by an EMINENT HAND.

L O N D O N :

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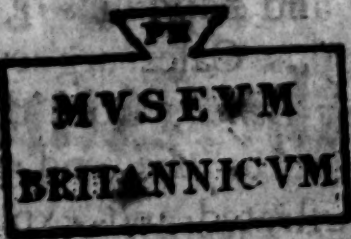
By J. WOKKALL and B. TOVEY, J. RIVINGTON, W. JOHNSTON, W. OWEN, and
P. URIEL. MDCCLXIX.

10

PREFACE.

LAW and Equity (the subjects of the ensuing Cases) must be allowed to be the highest excellencies in all civil governments; and as no nation can possibly exist without these rules and maxims, by their establishment and advancement will be acknowledged to be both the greatest honour and glory of a Prince, as well as the highest security and safety of the people. The first Part contains the Cases argued and adjudged in the Court of Chancery, from Michaelmas Term 1726, to Michaelmas Term 1727. Many of the most modern (which are always the best) established rules of practice and method of proceeding in that Court, but many useful and curious points relating to the rights and prerogative of the Crown, as well as the private and particular rights of the subject, in the arguing and debating whereof, not only doubtful former absolute opinions are cleared up and settled, but likewise many ancient and modern statutes are illustrated and explained. The latter part of this collection consists of some selected Cases argued and decided in the high Court of Chancery, inter Pasche 8 and Tril. 11 Geo. 1. inclusive, wherein not only divers of the points and statutes before-mentioned are expounded and determined by an equitable construction, but also several instances of relief given in Cases not relievable at law, and the three following Cases on Appeals.

1. The



T H E

P R E F A C E.

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The first Part contains Cases argued and adjudged in the court of *King's Bench*, from the beginning of *Michaelmas Term* 1721. to the end of *Trinity Term* 1726. wherein are illustrated and explained, not only many of the most modern (which are always the best established) rules of practice and method of proceeding in that court, but many useful and curious points, relating to the rights and prerogative of the crown, as well as the private and particular rights of the subject; in the arguing and debating whereof, not only diverse former abstruse opinions are cleared up and settled, but likewise many antient and modern statutes are illustrated and explained.

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1. The

The P R E F A C E.

1. The case of *Trevor* and *Trevor*, relating to the marriage articles, and divers other settlements, made by Sir J. T. late Master of the *Rolls*, decreed and appealed in 1719.

2. The case of *Roper* and *Radcliff*, on the stat. 11 & 12 W. 3. for disabling papists to purchase lands, decreed and appealed about 1713. with two learned and elaborate arguments on the hearing that cause.

3. The case of the Lord *Derwentwater*, upon an appeal from the commissioners of forfeited estates, heard before the judges thereto delegated, 16 Feb. 1718. 5 *Georgii*.

PREFACE to *Second Edition*.

The Editor having been favoured with a sight of many marginal notes, and corrections made soon after this book was published, by a gentleman then at the bar, for his own private use, and founded upon contemporary notes of the cases therein contained, and judging from such marginal notes and corrections "that the book must have been exceedingly imperfect and erroneous," hath done his best endeavours to supply the defects of the former wretched edition. He hath, besides, added many references to books of reports published since; which comprehend a period of near forty years. The principal additions are distinguished by inverted commas, or by being introduced as marginal notes,

A TABLE

T A B L E

O F T H E

N A M E S of the C A S E S in B. R.

A.			B.		
A BDELARD v. —	Page 56		Baggot v. Oughton	249, 381	
Addison v. Paterfon	289		Barnsley v. Shrimpton.	Intr. Pas. 10 Geo.	
Aldridge v. Snowden.	Intr. Pas. 10 Geo.		Rot. cvii.	304	
Rot. ci.	130		Beach v. Hobbs	379	
Ancell v. Sloman	344		Belt v. Collins	147	
Andrews v. Harper	227		Biggs v. Greenfield and Benger.	Intr. Hill.	
Paradise.	Intr. Pas. 10 Geo. Rot.		9 Geo. Rot. clviii.	217	
xcix.	318				
Anonymus Administration	244				
Arrest of Judgment	226				
Attachment	ibid.				
Bail	336, 340				
Costs	73				
Execution	225				
False Latin	342				
Jeofailes	198				
Indictment	164, 248				
Information	187				
Money paid in Part	236				
Murder	164				
Pleading	289, 308				
Prisoners	226				
Prohibition	194				
Replevin	379				
Writ of Enquiry	349				
Anstruther (Sir Alex.) v. Chrifty	121				
Archer v. Swetnam	338				
Arthur v. Commissioners of Sewers	331				
Ashton v. Blagrave.	Intr. Mich. 12 Geo.				
Rot. ccclxviii.	270				
Atkinson v. Coatsworth	33				
Atwood v. Beach.	113				
B.			C		
			Cæsar v. Holt & al.	110	
			Cambridge v. Lea.	Intr. Pas. 11 Geo. Rot.	
			xc.	380	
			Carter's Case	340	
			Carvel v. Manly, or Manby.	Intr. Mich.	
			7 Geo. Rot. lx. and lxxxvi.	Intr. Mich.	
			8 Geo. Rot.	30	
			Chamberlain of London v. Lopez.	Intr.	
			Mich. 8 Geo. Rot. cxxii.	103	
			v. Green	211	
			Chrifty v. Manucap. Anstruther.	Intr. Hill.	
			9 Geo. Rot. cccclxvii.	237	
			Clerk v. Dyer	290	
			Cloud v. Nicholson	242	
			Coatsworth v. Shaftoe	109	
			Coke v. Allen.	Intr. Pas. 8 Geo. Rot. ccxviii.	
				77	
			Coleborne v. Stockdale	57	
			Colebrook v. Diggs.	Intr. Hill. 7 Geo.	
			Rot. cclxxvi.	79	
			Colvin v. Fletcher	43, 381	
			Coningsby's (Lord) Case	20	
			v. Steed	192	
			Cook v. Wingfield	176	
			a	Cooper	

A Table of the Names of the Cases.

	Page
Conger v. Beale	109
Cornish v. Clarke & al ^l Intr. Mich.	10 Geo.
Rot. xxxvi.	199
Cotton v. Owen	343
Cowper v. Ginger Intr. Pas.	10 Geo. Rot.
alix.	305, 316, 381
C. v. Spencer	376
Croft v. Butel the Bail of Harris	187
Crosse v. Talbot	288
Crowther v. Wheat	243
Crundell v. Bodily	225
Cuband v. Dewsbury	327
Curvin v. Fletcher	43, 381

E.

East-India Company v. Ellis	240
Elliot v. Cowger	307

F

Flemming v. Parker	108
Boy v. Carne	283

Q

Oliver (St.) Parish of Everlay and Blackwater		
Parishes	_____	160
Glyn v. Yates	_____	31
Goddard v. Gilman	_____	282
Goodright v. Ople	_____	123
Goldwin and Halls	16 in Notes	
Gravenor v. Salter	_____	303
Graves v. King	_____	310
Guy v. Mendez	Intr. Mich. 9 Geo. Rot.	
Griffith's Case	_____	349

H

Harrison v. Green.	Intr. Mich.	11 Geo.
Rot. II.		178
Hawker v. Hinton.	Intr. Hill.	10 Geo.
Rot. ccxcviii.		243
Heavyfide v. Davis		348
Healy v. Roffe		306
Herbert v. Morgan		296
Hilliard v. Phaly & al		181
Hinton v. Parker		168
Holoway v. Thurston		102
Holkins v. Corbet		11
Hudson v. Howard.	Intr. Mich.	10 Geo.
Rot. ccclv. and Hill	10 Geo.	Rot. ccclv.
Hutchinson v. Smith		327
Huxter v. Gapan		240
		176

1

Jenny v. Heale
Jesse v. Thurgis

K.		
Kent v. Kerry.	Intr. Trin.	11 Geo. Rot.
cxixvi.		Page 355
King & Ux' v. Balingham.	Intr. Trin.	
9 Geo. Rot. cclxxx.		199, 341
f Achworth & al		81
Armagh Archbishop, and Ano-		
other.	Intr. Mich.	7 Geo.
Rot. ccciv.		5
Ashton		175
Athos		135
Austin		309
Bail of Strudwick		194
Bedford, Mayor and Common		
Council		34
Beecher		335
Brecknock Corporat		201
Brereton		318
Brickhill Inhabitants		38
Burnaby		146
Burridge		245
Butler		350
Cambridge Univer.		148
Carlisle Mayor and Aldermen		99
Chandler		336
Chester Bishop.	Intr. Mich.	
11 Geo. Rot. lxix.		364
Clagg		3
Cockran		96
Colvin		226
Cracker		285
Disney		60
Dunbart		240
Dunnington Inhab.		39
Edward & al		320, 326
Erbury		177
Fairclough & al		61
Ford		174
Gage		63
Gibbs		58
Glegg		3
Grey		358
Guilford Town Cler.		208
Harley		327
Harrison		135
Harwood		380
Holloway Sir Charles		283
Hutchinson		19
John		132
Johnson		214
Jones		201
Journeyman Taylors of Cam-		
bridge		10
Kelley		99
Kingston Mayor		209
Lambeth Par. Parish		61
		Layer

A Table of the Names of the Cases.

Page 82		Page 357	
Laver	267	Westbury	325
London Chamberlain	267	White	370
Malmesbury Mayor and Burgesses	55	White Chapple Inhab.	210
Marfellon alias White Chapple	370	Whitechurch Mayor	123
Inhab.	74	Wiatt	287
Mason	337	Wilby Parishioners	9 Geo.
Monmouth Mayor	337	Knight v. Cambridge. Intr. Hill.	10 Geo. Rot.
Nicholls	96	Rot. cccxxv. and Pas.	234
North and Gray	67	ccclxxxiv.	
Oakley	45		
Okey	214	L.	
Oland	96	Lawson v. Dickenson	306
Orrery (Earl)	60	Lawrence v. Jacob	43
Oxon St. Peter's Inhab.	50, 60	Lilly v. Hodges	166
Penryn Corporation	215	Lifter's Case	22
Pepper	227	Lock v. Wright	40
Pyke	286	London Chamberlain v. Green	211
Pindar	234	Long v. Nixon	229
Pollard	264	Lovecock v. Sorrel. Intr. Hill.	9 Geo. Rot.
Powel & al.	165, 182, 291	ccccxxii.	72
Powis (Marquis)	26	Lowther & Ux' v. Kelley. Intr. Hill.	9 Geo.
Prisoners in the Tower	96	Rot. cclxxviii.	115
Purcell	289		
Reeves	296	M.	
Richmond	95	Macdonel v. Weldon or Welder. Intr. Hill.	
Robarts	307	8 Geo. Rot. xlix.	54
Robinson	336	Madox v. Taylor	370
Rochester Bishop	96	Manning v. Turner	280
Rotherhith Ch. Ward.	339	The Mariners Case	379
Rufford and Dunnington Inhab.	39	Martin v. Budgell. Intr. Pas.	7 Geo. Rot.
Selfe	45	ccclxv.	283, 368
Serle	332	— v. Pritchard. Intr. Hill.	11 Geo.
Seymour Richmond	95	Rot. cxv.	345
Shippen Dr. & al.	367	— v. Henriques. Intr. Pas.	6 Geo.
Simpson	325	Rot. cxii.	239
Smars	288	Mason v. Bushell or Ruffel	51
Sparling	58	Mayhoe v. Archer	46
Spittlefields Hamlet	308	Miller v. Bradley	189
Sprigg and Oakley	66	Monk v. Graham	9
Street and Stroud	98	Moor v. Thompson. Intr. Pas.	8 Geo.
St. John's Parishioners	285	Rot. xxxv.	78
St. Mary's Marlborough	344	Moorfoot v. Chivers. Intr. Pas.	10 Geo.
St. Peter's Oxon	60	Rot. cclxxii.	372
Surrey Inhabitants	119	Mordant v. Small. Intr. Mich.	9 Geo.
Tenterden Mayor	114	Rot. cclxi. and Mich.	10 Geo. Rot. cxc.
Thrad	319		218
Thorogood	179	Morgan's Case	206
Tiverton Mayor	186	Morrice v. Lee	362
Tregony Mayor and Burgesses	113, 127	Morse v. Surry. Intr. Hil.	9 Geo. Rot. lxxv.
Trinity Chapel Dean and Chap-	27, 337	and Pas.	9 Geo. Rot. cclxiii.
ter in Dublin Par. Chester	366	Mosse v. Bennet. Intr. Trin.	9 Geo. Rot.
Tuck	377	ccclxxxiii.	180
Venables	5	Muck's Case	342
Waler	65	Myer v. Yellop	
Watson			
		N.	
		Newland v. Filer	304
			O.

A Table of the Names of the Cases.

				Springet v. Chadwick		—	Page 290
				Stamper v. Hodson		—	302
Olave (St.) Parish v. All-hallows Parish P. 168				Steed v. Lateward.		Intr. Pas.	10 Geo.
				Rot. cccxxxiv.		—	366
				Stratford v. Neale		—	1
				Strong v. How		—	339
				Swetnam v. Archer		—	338
				T.			
				Thead v. Starkey		—	314
				Townsend v. The Assignees and Commis- sioners of Bankruptcy		—	316
				Trinity Chapel v. Archbish. of Dublin.		Intr.	—
				Pas. 8 Geo. Rot. ccxxxv.		—	183
				Tucker v. Goldburne		—	78
				Turner v. Mosse.		Intr. Pas. 11 Geo. Rot.	—
				clxxxi.		—	377
				v. Turner		—	208
				V.			
				Vaughan v. Evans		—	374
				W.			
				Waddy v. Newton		—	275
				Wadsworth v. Handaside.		Intr. Pas. 10 Geo.	—
				Rot. clxxix.		—	228
				Walron v. Henricus Van Moses.		Intr. Trin.	—
				9 Geo. Rot. cccclxxxiii.		—	321
				Waller's Case		—	129
				Warren v. Conset.		Intr. Hill. 8 Geo. Rot.	—
				xlvi.		—	106, 323, 381
				Webster v. Gearing		—	234
				Weldon v. Buckler		—	313
				Welsh v. Craig.		Intr. Pas. 11 Geo. Rot.	—
				clxxxvi.		—	373
				Whitechapel Parish (the Case of)		—	369
				Whitley v. Loftus.		Intr. Trin. 9 Geo. Rot.	—
				xxix		—	190
				Wild v. Harding		—	281
				Wilkinson v. Mathews		—	80
				v. Meyer.		Intr. Hill. 9 Geo. Rot.	—
				ccxx. and Trin. 10 Geo. Rot. cccxlv.		—	173, 232
				Williams v. Green		—	295
				Williams v. Lyons		—	189
				Wills v. Wills		—	24
				Wilson v. Aldridge		—	315
				v. Machin.		Intr. Mich. 11 Geo.	—
				Rot. clx.		—	350
				Winnington v. Briscoe.		Intr. Pas. 8 Geo.	—
				Rot. cccli.		—	51
				Woolley v. Briscoe		—	173
				Wright v. Horne		—	221
				v. Mason		—	109
				Wrotham Parish v. the Parish of St. Olave's		—	200
				Wyvel v. Stapleton.		Intr. Hill. 8 Geo.	—
				Rot. cccclxv.		—	68, 314, 381

				O.			
				Palmer v. Byfield		—	290
				Parr v. Niblet.		Intr. Trin. 10 Geo. Rot.	—
				ccclvii.		—	213
				Parr v. Purbeck		—	196
				Parsons v. Peacock		—	346
				Patterson v. Dyer		—	289
				Pennoire v. Brace		—	108
				Perry v. Kirk.		Intr. Hill. 11 Geo. Rot.	—
				ccclxvii.		—	343
				Phillybrown v. Reyland.		Intr. Pas. 8 Geo.	—
				Rot. ccxliii.		—	52, 351
				Phillips v. Fish		—	371
				v. Doelittle		—	345
				Plunket v. Gillmore.		Intr. Hill. 7 Geo.	—
				Rot. cccxcii. and Mich. 9 Geo. Rot. xci.		—	215
				Pocklington v. Hatton		—	220
				R.			
				Read v. Marshall.		Intr. Mich. 8 Geo.	—
				Rot. xcvi.		—	26, 342
				Reynolds v. Clerke.		Intr. Trin. 8 Geo.	—
				Rot. cccclxxiv.		—	272
				S.			
				Saladine v. Jacobson.		Intr. Mich. 9 Geo.	—
				Rot. ccciv.		—	291
				Salter v. Grosvenor		—	303
				Savile v. Snell		—	305
				Serle v. Barrington.		Intr. Hill. 10 Geo.	—
				Rot. cccxxxii.		—	278
				Seviniack v. Marshall		—	288
				Shaw v. Way.		Intr. Mich. 9 Geo. Rot.	—
				lxxxix. and cviii.		—	253, 382
				Sheers v. Larimas		—	52
				Shelburn v. Stapleton.		Intr. Hill. 8 Geo.	—
				Rot. cccclx.		—	292
				Shipwith v. Green.		Intr. Mich. 11 Geo.	—
				Rot. clxxxiv.		—	311
				Shipton v. Hopton.		Intr. Hill. 10 Geo.	—
				Rot. cclxxvi.		Hill. 11 Geo. Rot.	—
				clxxxiii.		—	238
				Sloan's (Sir Hans) v. Lord Pawlet		—	12
				Smith v. Graham		—	283
				v. Jones.		Intr. Trin. 8 Geo. Rot. cccx.	—
				and Intr. Trin. 11 Geo. Rot. cxlviii.		—	118
				v. Trigg		—	23
				Spackman v. Hufley		—	77
				Sparks v. Keeble		—	330
				Spiller v. Adams or Andrews		—	25

D E

Term. * Sanct. Mich.

Pasch.
3 Geo.

Anno 8 Georgii, 1721.

Stratford *†* versus Neale, Friday 17 Nov. Roll 184.

† This case was argued once before,

viz. Friday 27 Jan. 1720. and five more exceptions were taken; which see in Fortesc. Rep. 350. the case at large, with both the arguments and opinion of the court, are in Stra. 482.

UPON a writ of error on a judgment given in the court of King's Bench in *Ireland*; the case was thus:
ff. One Neale libelled in the spiritual court there, for *two third parts of the tithes due to him for dry cattle fed in such a parish, &c.*

Variance between the libel and the plea.

The defendant suggested for a prohibition, that the cattle for which those tithes were demanded were *beasts of the plough*, and other dry cattle fed in the said parish with hay and stubbles of corn, for which tithes had already been paid; whereupon a prohibition was granted; and that the right might come in question, the said *Stratford* was ordered to declare upon the prohibition, which he did, and in the same manner as before he had suggested, and concluded his declaration, that the defendant had proceeded in the spiritual court after a prohibition delivered, &c. *Et contra prohibitionem, &c.*

The defendant pleaded, that the cattle for which he had demanded the said tithes were not such as the plaintiff had set forth in his declaration, nor fed with such hay and stubbles, for which tithes had already been paid; and then pleaded, that he had a right to *two integral parts* of the tithes of all dry cattle fed in that parish, and that he had not proceeded *contra formam prohibitionis, &c.*

Upon this they were at issue, and the defendant had a verdict and judgment for a *consultation*, which was awarded; * on which judgment the now plaintiff brought a writ of error; and it was insisted for him, that there was a variance in the pleadings, and that the verdict would not support this judgment.

* P. 2.

First, As to the variance in the pleadings, (*viz.*) the plaintiff in the spiritual court had by his libel demanded *two third parts* of the tithes due to him for dry cattle, &c. and being defendant in the action, he claimed a right to *two integral parts of the tithes*, &c. so that his plea varies from his libel, and therefore a consultation should not be awarded, because that gives him a power to sue for any thing not in the libel; therefore he has made no sufficient title.

To which it was answered, that the awarding a *consultation* is no more than giving the defendant liberty to proceed on his former libel in the spiritual court, and consequently if there is any variance between the libel and the plea, it is no cause to reverse the judgment, because the consultation gives him no new power to sue for any thing, but only to proceed on that very libel which he had already exhibited; "That it is a matter of appeal, not of prohibition: But however that there could be but one part remaining."

Then, as to the verdict, it was objected, that the jury found that the cattle for which the said tithes were demanded, were not fed with hay and stubbles for which tithes had been already paid, but they did not find that there were any proceedings in the spiritual court after a prohibition delivered; and therefore it was insisted for the plaintiff in this action, that if all the issues are not found, this judgment cannot be supported; and it is part of this issue, that the defendant had proceeded in the spiritual court after a prohibition delivered; and if this had been found, then the plaintiff would have been entitled to damages.

3 Lev. 39, 55. It is true, if an issue is joined on part of a thing in suit, and that part is found by the jury, such a finding will support the judgment; W. Jones 447. Rol. Abr. 515, 575. T. Jones 128. Plowd. 471. but when several issues are joined, as in this case they are, and some are found, and some not found, the verdict is insufficient. (*Quod cur' concessit.*)

* Vent. 348, 350. It is certain the plaintiff would have been entitled to damages, if this matter had been found, for there is an authority in point, * where it was found, and the plaintiff had judgment for his damages; it is true, that judgment was reversed, but it was because the plaintiff had not laid a *venue* where the proceedings were, &c. after the prohibition delivered.

* P. 3. To which it was answered, that this objection is only to matter of form, which is cured by the verdict, for so is * the not finding any proceedings by the defendant after a prohibition delivered, and Saund. 81, 140, 141. Parl. Cases 201. Bishop v. Needler. Plowd. 468, 471. 1 B. of Judgments 101, 102, 105, 106. Rast. Ent. 490, 491. 2 Townsend 172. Leon. 240.

Curia.

The court was of opinion, that the awarding a *consultation* is no more than setting aside the *prohibition*, and giving the plaintiff in the spiritual court liberty to proceed on his libel; and that the variance between his libel and his plea is not material; for though in the

Term. S. Mich. 8 Georgii, 1721.

the one *two third parts* are demanded, and in the other *two integral parts*, yet that must be understood *secundum subjectam materiam*.

As to the other objection against the verdict, it is true, where several issues are joined, a verdict which finds one, and not the other, is not good; but in this case the not finding any proceedings in the spiritual court *contra formam prohibitionis*, is but matter of form; however, this verdict hath found all the material parts in issue; and therefore it is sufficient to support this judgment. Where several issues are joined, and the jury find one.

Now the alledging in the declaration, that the plaintiff in the spiritual court had proceeded there *contra formam prohibitionis*, is but a supposed contempt, and suggested by the plaintiff in the action as a ground for a *prohibition*, and the not finding this contempt is altogether immaterial, and the same with not finding *vi et armis* in an action of trespass; it is true there are precedents both ways; but in such cases the Judges always follow that which is least prejudicial.

As to that case in *Ventris's Reports*, there was actually a proceeding after a prohibition granted; and this was found by the jury, and damages assessed; but the *venue* being laid in a wrong county, the jury could not subject the defendant to pay the damages; and therefore that judgment was set aside; so it is out of this case.

Besides, if the plaintiff would have any advantage by the defendant's proceeding after a prohibition, this being matter of evidence, he (the plaintiff) should have proved it in the trial, and insisted on his damages; which he had not done; therefore the judgment was affirmed by the whole court.

The King *versus* Glegg, or Clagg. Tuesday, 7 Nov.

THE defendant Glegg was, by the (a) order of two justices of the peace, adjudged to be the putative father * of three bastard * P. 4. children; and it was ordered, that he should pay 10 l. to the overseers of the poor of the parish of, &c. for charges which the said parish had already sustained by reason of those bastard children, and 2 s. and 6 d. every week for so long time as the said children, or any or either of them, should be chargeable to the said parish; it was insisted on Glegg's behalf, that the order was irregular. Order of bastardy quashed, for not setting forth that the party was duly summoned. Stra. 475.

See 2 R. Raym. 1406. (a) It was an order made originally at the sessions.

First, Because it did not set forth, that Glegg was *duly summoned* See post 309, 310, 377, 378. S. P. to appear before them; it is true, it set forth, that he had notice to appear, but did not shew for what cause; and therefore it is no regular summons; " Nor does it appear that he was ever heard. " This

Term. S. Mich. 8 Georgii, 1721.

“ This order being made at the sessions is very different from an
 “ order made by two justices, because from that the party has a
 “ right of appeal. *Queen v. Cripps*, P. 11 Ann. Cas. Set. and Rem.
 “ 38. pl. 63. V. post. 309, 310, S. P. 377, 378.
 “ (2.) The two justices have not power to charge him with a sum
 “ in gross. *Queen v. (a) Steventon*, M. 10 Ann.
 “ (a) Eyre said, that the order in the case of *The Queen v. Steventon*, was to pay so much a week for twelve years, which was not good; for it ought to be payable only so long as the child was chargeable to the parish. Justices may order a sum in gross, for putting a child out an apprentice. Cro. Car. 470. pl. 2.”
 “ *Pratt C. J.* No notice seems necessary. In the case of *The King v. Simpson*, H. 3 Geo. upon conviction for deer-stealing, after long deliberation, we adjudged that he might be convicted without his general appearance. Str. 44. 10 Mod. 248, 341, 378. Sef. Cas. 346. pl. 273. *Gilb. Cas.* 282.
 “ *Eyre Just.* The reason why it is not necessary to shew a notice in an order of two justices is, because the party has an appeal to the sessions, where he may be heard. It was never fully determined till P. 11 Ann. that the sessions has original jurisdiction of bastards. That act of 3 C. 1. c. 4. which has given the sessions jurisdiction, has given them the same power as the two next justices had by 18 Eliz. and if so, why can't an appeal lie to the next sessions from this order as well as if it had been made by two justices? Besides, this being an order made by the sessions in a matter of which they have jurisdiction, we ought to intend their proceedings regular, when the contrary does not appear.
 “ *Fortescue Just.* As to the want of notice, natural justice requires that every man be heard before he be condemned in judgment, unless through his own default. But though every person accused ought to be summoned, yet the question will be, whether such summons must of necessity appear upon the record. A summons is always set forth in case of a *mandamus*, and in a conviction for deer-stealing. In this case it shall be intended that the defendant was summoned, since the contrary does not appear. *Queen v. Lunn*, Trin. 3 Ann. 6 Mod. 204. And this exception was made in the case of an order for removing an apprentice; but was over-ruled on the supposition of regularity.
 “ *Pratt L. C. J.* I do not understand the distinction which has been taken when we are to presume the proceedings by justices regular, and when not; for we are to examine all their proceedings, upon a supposition of irregularity: the case of *Queen v. Lunn*, I heard Lord Parker, when C. J. deny for law: And I shall never give any opinion to confirm such an order; for whether the wages were due for husbandry or not, was the point of their jurisdiction; and surely we can never intend them to have jurisdiction of what they do not shew to be within their jurisdiction.
 “ As to the argument that no notice is necessary, because an appeal lies to the next sessions: I don't see how an appeal can lie from one sessions to another, since it is the same court, though composed of different persons.

Term. S. Mich. 8 Georgii, 1721.

It is admitted, that the justices of peace have an original jurisdiction in cases of bastardy, and that their orders if regular shall be conclusive, but if irregular (as this is) they shall be quashed.

As to the other objection, a putative father may be charged with a sum in gross, though this is seemingly against the statute 18 Eliz. by which the power given to the two justices, is to charge the mother, or reputed father, with the payment of money weekly; but they have likewise power to take order for the relief of the parish, which must be intended against the charge which it (a) may sustain, as well as against the charge already sustained.

Putative father may be charged with a sum in gross. 18 El. c. 3.

(a) This must be a mistake, for Pratt

C. J. said, an order to pay a sum in gross, for relief of a parish, is not good, but when it is for reimbursing a parish, it cannot be otherwise; which was not contradicted by the rest,

There was another objection against this order, (*viz.*) that Glegg was charged to be the father of three bastard-children by one order, when there should be as many orders to charge him as there were bastards.

But as to this matter, the court gave no judgment, but that the parish should have time to shew whether Glegg was regularly summoned to appear before the two justices who made this order.

"There was another exception, *viz.* That the defendant is ordered to give security for the performance of the order, which is illegal.

"*Per cur.* The justices cannot order security, unless in the case of a contempt; let that part of the order be discharged; and it was adjourned as to the rest.

* The King *versus* Walter.

* P. 5.

THE defendant was committed by a warrant under the hand and seal of a justice of the peace for being a notorious owl and smugler; and being in custody he brought an *babeas corpus*, and moved by his counsel to be discharged.

The defendant being in custody, must be tried within two terms after the indictment found.

(1.) Because he had been in gaol two terms since the indictment was found, and not yet brought to his trial.

(1.) Qu. If there was any such objection.

(2.) The charge in the warrant of commitment is very loose, (*viz.*) for that the defendant was a notorious owl and smugler, which is not a sufficient charge to deprive a subject of his liberty, especially in a criminal cause where the utmost certainty is required.

(3.) "It does not appear that the defendant was charged on oath."

(4.) "No time is alledged when the fact was committed."

The court allowed the first objection, (*viz.*) that the defendant ought to be tried within two terms after his commitment, according to the *babeas corpus* act.

Curia.

Term. S. Mich. 8 Georgii, 1721.

But as to the other objection they held, that a justice of peace must take care that he hath such an information of the fact as may be sufficient to support his warrant of commitment; but he need not set it forth in the warrant itself, because so much certainty is not required in warrants, as in writs and pleadings which are always on record.

"Cur. was of opinion to bail him; but he having no bail was remanded."

The King *versus* Archbishop of Armagh and Jackson.
Wednesday 15 Nov.

Churches cannot be united after the avoidance of one.
Barnard. K. 34, 42, 170, 285.
Stra. 516.
2 Stra. 837.
Fortesc. Rep. 213.
Fitzgib. 30.
† 17 Car. 2. cap. 3.

* P. 6.

UPON a writ of error on a judgment in the King's Bench in Ireland, the case was thus:

¶ The King was seised of the advowson of the vicarage of *Louth* in the diocese of *Armagh*; and the archbishop was seised of the advowson of the rectory of, &c. near the said vicarage, and being so seised, the King's incumbent died; and after the said vacancy, the archbishop by an instrument under his archiepiscopal seal united both the said livings according to the power which he had by the statute † 17 Car. 2. by which it is enacted, That in every city or town corporate, and their liberties, where there are two or more churches or chapels, and parishes thereunto belonging, the bishop of the diocese, with the consent of the chief officer or officers there, or the major part of them, and of the patrons of such churches may unite them, &c. and the parishioners shall pay all tithes and other duties to the incumbent of the church to which the other is united; but that notwithstanding such union, the parishes shall continue distinct as to all rates, taxes, and parochial rights, and churchwardens shall be appointed for each parish as before the union.

And where one or both of the said churches are full at the time of the union, it shall take effect at the next avoidance after; and the patrons shall present by turns to that which remains, &c. and that he whose incumbent dies first, shall first present, and afterwards by turns successively for ever.

Now the King's incumbent being dead, (and the vicarage being afterwards united to the rectory as aforesaid) the King presented another vicar, and the archbishop refusing to admit him, a *quære impedit* was brought against him (the archbishop) and judgment against him in the King's Bench in Ireland; upon which he brought a writ of error in this court.

"The great question was, Whether since the one advowson belongs to the crown, there can be any union by virtue of the act, i. e. whether the King is bound by the general words of the statute."

Term. S. Mich. 8 Georgii, 1721.

"The second point was, Whether any union could be made when one of the churches was *vacant*."

And his counsel argued for him, that by the general words of this statute, this was a good consolidation, tho' after the avoidance of the vicarage by the death of the King's incumbent; and that the King's ordinary right shall be bound by such general words in an act of parliament, which in this case was his right of presentation, tho' a right, which he hath by any prerogative, shall not be bound by such words.

Every statute which is made for the advancement of justice, for the establishment of religion, or to suppress wrongs, or to perform the will of the donor, to maintain the poor, or for the encouragement of learning, shall bind the ordinary right of the King by general words as well as the right of the subject; and this statute hath two of these purposes, (*viz.*) establishment of religion, and encouragement of learning.

And this is proved by every saving of the King's right in an act of parliament, for that shews his right would be bound, if it was not saved.

"There was another objection, *viz.* That it ought to have been *averred* that the archbishop was *bishop of the diocese*, and the union to have been set forth under the seal *episcopal* as well as *archiepiscopal*; but the court took no notice of it."

On the other side it was argued to support this judgment, that by the statute before-mentioned, a new power was created, and consequently it must literally be performed, which in this case was not done; nay, it is impossible to be done, because it is enacted, that after the union, the patron whose * incumbent first dies, shall have the first presentation, which shews, that the legislature intended that both the churches should be full at the time of the union; for otherwise the right of survivorship could never take place: now here one was void, when it was united to the other, and after it was consolidated to the other, there was but one incumbent; and if but one incumbent, then it is impossible that those words in the statute can ever be satisfied, (*viz.*) That he whose incumbent first dies shall first present, for these words import, that both the incumbents must be living at the time of the union.

Now here the King's incumbent was dead before the union, and consequently a right was vested in the crown to present another; and it would be very hard, and what was never intended by this statute to divest the King of that right by such an union as was made by the archbishop in this case.

Besides, it may be reasonably intended, that the King is not comprehended in this statute, because the union is to be at the equal expence of both patrons, and by their consent; and it would be indecent that the King should join with a subject in the expence of a commission.

It

Term. S. Mich. 8 Georgii, 1721.

It is true, this union creates a new parsonage, and the church being full of the archbishop's incumbent, he may claim a right to both; but that can be no objection, because in a *quare impedit* plea narty is no plea against the King's right, "tho' given by *W. 2. c. 5.* which is general, and does not name the King; for if the King is not named, the general words of an act do not bind any prerogative or royal interest vested in him."

11 Rep. 72.
7 Co. 32.
3 Lev. 382.

Upon the whole matter it was admitted, that the words in this statute are general, and that the right of the crown may seemingly be bound by them; but tho' the words are general, yet they ought to be specially construed to avoid an apparent injury; for the intent of the act was to put things in an ordinary and regular method, and not to devest either of the patrons of their respective right, and such a construction would be conformable to the intent of the legislature, (*viz.*) That all unions should be made by the consent of both patrons, and not to the damage of either; and that the churches should be united when there are two incumbents living, because the statute gives the right of presentation to that patron whose incumbent should first die, which might happen to be the King's incumbent; but now by this union, he is deprived of that surviving and contingent right of presentation, which is an apparent damage done to the crown.

Curia.

* P. 8.

The court was of opinion, that this statute never intended any union should be made of two churches after an avoidance in one; for by the common law (by which this act must be construed) there could be no union but by the * consent of both patrons; neither could it be made *in presenti*, but by the consent of both the incumbents, tho' the patrons did agree to unite, tho' it might be made *in futuro* without the consent of the incumbents.

Therefore it would be very hard to construe this statute so as to make an union good, where both the churches are not full at the time the union was made; for it is not so by the canon law in cases of presentation and consolidation, and it is that law which should direct in this case.

Hob. 143.
Where the
King cannot
be devested of
his prerogative
by general
words in a
statute.

It is clear that the King cannot be devested of any of his prerogatives by general words in an act of parliament, but that there must be plain and express words for that purpose, tho' all his other rights are no more favoured in law than the rights of his subjects; and it is likewise clear that general words in an act of parliament may be qualified by subsequent sentences or clauses in the same statute; but certainly it was never the intent of the legislature by this act to work a wrong to any patron; but if this union should be good, it would devest the King of that right which was already vested in him to present to this vicarage; and such a construction of the statute would be a damage not only to the crown, but it may happen so to be to several other patrons.

Besides,

Term. S. Mich. 8 Georgii, 1721.

Besides, in this case there being two benefices united after an avoidance in one, it is plain that the archbishop made the union for his own benefit, which is against a principle in law.

As to the *plenarty* which the defendant pleaded to this *quare impedit*, the whole court agreed, that it was not a good plea in bar to the King's right; and that was the principal reason why the court of King's Bench in *Ireland* gave judgment for the King.

Plenarty no good plea in bar to the King's right.

But as to some other points there were various opinions, (*viz.*) For all four of the Judges held, that the union was not good, because it was made after an avoidance of one of the churches united. *Fortescue* said that would be a proper question, and *beld* that it was good, but that it was not to take effect till after the King had presented to that church; and *Eyre* held, that by the union the church united was extinct, and that he did not know in what manner the King could present to a church which was extinct.

Fortescue held, that the church was not extinct by the union, because it was a spiritual act, which did not extinguish the church as to the right of either patron; for if one church had been appendant, and the other in gross before the consolidation, they would be so after it.

"*Pratt* L. C. J. As to the chief point—I think (as now advised) the King will be bound by the general words of this statute, he having no right in this particular, distinct from the right of a subject."

* But for the reasons before-mentioned, the whole court agreed, * P. 9. that the judgment in *Ireland* should be affirmed. (a)

but in *Easter* term following it was argued again, and the judgment was then affirmed. The last argument was only upon the second point, the court having been clearly of opinion upon the first (as was admitted by the defendant's counsel) that the King was bound by the statute.

(a) It was adjourned now,

Monk versus Graham.

AT the *nisi prius* in the Common Pleas; the case was thus: *Jf.* One *Hackett* bought stock to the value of 750 *l.* in the third subscription in the *South-Sea* company, and received 50 *l.* per annum for it, and afterwards sold it, which by several mesne conveyances came to the now plaintiff, Mrs. *Monk*, who purchased it for 1000 *l.* and she living in the country, entrusted one *Rosse* (who was an officer of the Exchequer) with the minutes, and an order to receive this 50 *l.* per ann. for her use, the said *Rosse* being then a man of credit, and discounting for at least 30000 *l.* per annum of the revenue.

Afterwards *Rosse* pretending he had a power to sell the said stock, made an agreement in writing with the defendant *Graham* to sell it to him for 994 *l.* and told him the plaintiff would sign the transfer, but he got another woman to personate the plaintiff, and to

sign the transfer; and at the next opening the books of the company he got the same transferred to the defendant, and made affidavit of the sale, and got it entered in the said books, this being required by act of parliament to every transfer, and then he withdrew himself out of the kingdom, so that he could not be found.

The plaintiff hearing that *Rosse* was withdrawn, came to *London*, and demanded the stock of the defendant, who told her, that he had bought it of *Rosse*, and had got the minutes, the transfer, and the affidavit, which were all the conveyance the law could give, and believed, that if she had any title, she had nothing to shew to make it appear; and therefore she came too late to make any demand on him.

Afterwards the defendant (tho' forbid by the plaintiff) sold this stock for 1090*l.* to *T. S.* who sold it again to *R. W.* for 1109*l.* and then the plaintiff brought an action of trover against the defendant; and notwithstanding her folly in trusting *Rosse* with the minutes, (which the counsel for the defendant did much rely on) the Chief Justice, Sir *Peter King*, directed the jury to find for the plaintiff, which they did, and gave her no more than 750*l.* damages.

* P. 10. * The Churchwardens of Bishopsgate *versus* Alderman Beecher.

Mandamus to a justice to grant a warrant to distrain for a poor tax. *Ses. Cas.* 367, 368. S. P. If the rate be illegal, the justices may refuse to sign it, and they may return it

for cause upon a mandamus directed to them to sign it; but as to the sum or parties assessed, they have nothing to do with it, the remedy is by appeal; and though the aldermen of *Dorchester* refused to sign a rate, because of inequality, yet the court granted a mandamus, and after a return, a peremptory mandamus, and then an attachment, in order that the parties grieved might appeal. Cited by the court in this case of *Beecher's*, 16 *Vin. Abr.* 429. pl. 3.

THE churchwardens of the said parish, &c. made a tax for the relief of their poor for a whole year, which amounted to 600*l.* and upwards, when they should have made only a quarterly tax; and the same, thro' inadvertency, was confirmed by alderman *Beecher*, who was alderman of that ward; and afterwards he fearing that the churchwardens might collect the whole sum, and make some ill use of it, refused to grant a warrant to distrain for this tax; whereupon the churchwardens moved *B. R.* for a *mandamus* to compel him to grant his warrant, and obtained a rule of court for him, to shew cause why a *mandamus* should not be granted.

And at another day the alderman by his counsel shewed all the matter before-mentioned for cause, &c. and a rule was made, that he should grant his warrant to distrain for the tax for one quarter of a year, and no more, for he could not confirm this tax in part; it must be for the whole, or for no part.

Term. S. Mich. 8 Georgii, 1721.

The King *versus* Journeymen-Taylors of Cambridge.

Monday, 6 Nov.

ONE *Wise* and several other journeymen-taylors, of or in the town of Cambridge, were indicted for a conspiracy amongst themselves to raise their wages; and being found guilty, they now by their counsel moved in arrest of judgment upon several errors in the record.

A fact was laid in the town of Cambridge, but did not say in what county, good; the indictment being for a conspiracy.

“ It was objected, that the defendants having the addition of yeomen are notwithstanding charged with a conspiracy not to work as journeymen-taylors, which is a repugnancy.

(2.) “ The caption is not good, being *ad general quartial sess. pacis, &c.* omitting *Domini Regis* after *pacis*. This exception has been several times held fatal, and is very different from the cases where they are omitted after the words *Justi dicti Domini Regis ad pacem in com. praed. conservand. assign.* *Sid.* 175. *Keb. Rep.* 656, 885. *Vent.* 39. *Offic. Clerici Pacis* 16. In *Hil.* 1 Ann. & *Hil.* 11 Ann. two indictments were quashed for this exception.

(3.) “ No crime appears upon the face of this indictment, for it only charges them with a conspiracy and refusal to work at so much *per diem*, whereas they are not obliged to work at all by the day, but by the year, by 5 *Elizabeth. c.* 4.

(4.) That this fact being laid in the town of Cambridge, it did not appear by the record in what county Cambridge was, which it ought to do, because there are other towns of that name in England in Gloucestershire. So a mis-trial; for there is no more reason to award the *venire* to the sheriff of C. than of any other county. The *ven. fa.* is awarded *vic. com. Cantab.* commanding him to summon a jury *de vicineta villae Cant.* In the margin of the indictment *villa de C.* In the indictment the *venue* is alledged only *apud villam de C.* *Certiorari* to remove it is directed *Just. Domini Regis de villa C. in com. nostro C.*

That this error was not helped by naming the county in the *certiorari* to remove the indictment, because that writ is only an order of this court.

Neither shall it be intended that Cambridge is in the county of Cambridge, because this is a criminal case, and intendments are never allowed in prosecutions of this nature.

(5.) This indictment ought to conclude *contra formam statuti*, for by a late statute anno 7 Georgii, journeymen-taylors * are prohibited to enter into any contract or agreement for advancing their wages, &c. * And the statute of 2 & 3 E. 6. c. 15. makes such persons criminal. *Saund.* 250. *W. Jones* 379.

7 Georgii cap. 13. * P. 11.

These

Econtra.

These objections were thus answered.

(1.) "Yeoman is a good addition, for a yeoman may be a taylor." 2 Inst. 668.

(2.) "To the caption—has been often over-ruled; for it must be intended the King's peace. That case in Vent. 39. has been denied for law.

(3.) "The refusal to work is not the crime, but the conspiracy.

(4.) That the fact being laid in the town of Cambridge, it shall be intended, that the town is within the county of Cambridge, for which the authority in the margin is in point.

5 Rep. 120.
Long's case.

Besides, the justices of peace having jurisdiction within the town of Cambridge, it need not be alledged in what county that town lies, because in order to support all inferior jurisdictions, this court will intend their proceedings to be regular and good, if the contrary doth not appear.

March 124.
Cro. Eliz 108.
Sid. 342.
34 H. 6. 49.
50. pl. 17.
Lev. 153.
2 Keb. Rep.
267.

(5.) As to the omission in not concluding this indictment *contra formam statuti*, it is not material that it should be so concluded, because it was for a conspiracy, which is an offence at common law; it is true, this indictment sets forth, that the defendants refused to work under such rates, which were more than enjoined by the statute, for that is only 2 s. per diem; but yet these words will not bring the offence, for which the defendants were indicted, to be within that statute, because it is not the denial to work for more wages than is allowed by the statute, but it is for a conspiracy to raise their wages, for which these defendants are indicted; it is true, it doth not appear by the record that the wages demanded were excessive, but that is not material, because it may be given in evidence.

Hob. 88.

"Cur. As to (1.) held there was no inconsistency between the addition of yeomen and taylor.

"As to (2.) the caption—said this exception had been often over-ruled, especially of later years.

As to (3.) it is true, this indictment sets forth, that the defendants denied to work under such wages as they demanded; but tho' this might be more than directed by the statute, yet it is not for the denial, &c. but for the conspiracy they were indicted; and a conspiracy of any kind is illegal, tho' the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it; and this appeared in the case of the tub-women against the brewers of London.

* P. 12.

"As to (4.) A venire facias directed to the sheriff of Cambridge to return a jury; if he return one de vicineto Cantabrigie, this is good; for Cambridge being mentioned in several acts of parliament, the court must take notice of such acts, and upon such a return will intend, that Cambridge is in the county of Cambridge.

Term, S. Mich. 8 Georgii, 1721.

" In the case of *Withers and Warner*, H. 6 Geo. we took judicial notice that *London and Civil London* were all one. The *certiorari* directed *Iusticiis Domini Regis de villa C. in comitatu nostro de C.* and returned by the justices of the vill in the county of C. so that it will be a very foreign intendment to suppose the vill to be out of the county.

" As to (5.) that this indictment need not conclude *contra formam statuti*, because it was for a conspiracy, which is an offence at common law.

So the judgment was confirmed by the whole court,

Quod capiantur.

The * case of Sir Hans Sloane, President of the college of physicians *versus* Lord William Pawlett. Saturday, 25 Nov.

* This case was twice argued: and here both arguments are blended together.

IN trespass for entering his house, and taking a silver tankard; the defendant pleaded not guilty, and the special matter was given in evidence, *viz.* a justification under a warrant from the lieutenancy of *Middlesex* to levy 8 l. by distress, &c. for not appearing, &c. being duly summoned, and for not finding a horse to serve in the militia; and this cause being at issue, and coming on to a trial before the Lord Chief Justice *Parker*, (now Lord Chancellor) he ordered it to be made a case, and to be referred to the opinion of the court of King's Bench, which was accordingly done, and coming now before the court, the case was thus stated:

Whether the physicians are excused from finding a horse to serve in the militia.

Jf. That the Lord *William Pawlett* and others were deputy lieutenants of the county of *Middlesex*, and as such had power by the statute 13 & 14 Car. to call together persons from time to time, and to arm and array them, as by the said statute is directed, and to charge him who hath an estate of 500 l. *per ann.* in possession, or 6000 l. in goods and money, with horse, horseman and arms, and so proportionably.

13 & 14 Car. 2. cap. 5.

And by the same statute power is given to the lord lieutenants and their deputies, to inflict a penalty not exceeding 20 l. upon those who are charged, &c. and who neglect to find a horse, &c. and to serve in person, or to provide another to serve in his place, which penalty is to be levied by warrant, by the distress and sale of goods, &c.

That the said deputy lieutenants caused the plaintiff Sir *Hans Sloane*, President of the college of physicians, to be summoned to appear in person, or to find a horse and arms for his estate at *Chelsea* of 500 l. land in possession, which is within seven miles of *London*, for another to serve in the militia, &c. in his place, which he re-

fused,

Term. S. Mich. 8 Georgii, 1721.

refused, insisting on a charter of exemption granted to the college of physicians by King Charles the second, dated 26 March in the 15th year of his reign, exempting all members from bearing or providing arms to serve in the militia in London and Westminster, or the suburbs, or within seven miles thereof, and that every designation or appointment to the contrary shall be utterly void, &c. by which charter another is recited, which was granted to the said college by King H. 8. and another by King James the First, exempting them from several services.

Thereupon the plaintiff Sir Hans Sloane was fined 8*l*. and a warrant was granted by the Lord Pawlett to levy the same by distress and sale of his (the plaintiff's) goods, and accordingly the officer to whom the warrant was directed entered the house, and distrained a silver-tankard, for which the plaintiff brought this action of trespass, and the defendant justified, &c.

Now upon arguing this case, three points were made.

(1.) The first was concerning the King's power to grant charters of exemption from the penalties or charges imposed on the subject by act of parliament.

(2.) Admitting the King had such a power, then whether there were sufficient words in this charter to make such an exemption.

(3.) Whether the justification under this warrant was good. By Baines. As to the first point, it was argued for the plaintiff, that the King hath power by his charter to exempt any subject from the penalties of this statute.

Whether the King hath a power to grant charters of exemption from penalties imposed by act of parliament.

See Dyer 52, 211.
Plow. Com. 226, 501.
6 Rep. 7.
7 Rep. 63.
Cro. Car. 428.
Vaugh. 381.
3 Lev. 392.

Now that he hath power to exempt the subject from the penalties in this statute seems very plain, because before this statute was made, the power of the militia was in the King, and it was originally so at common law; and this statute was made to ease the crown of a labour, and to put things in an ordinary form, but not to deprive the King of that power which he had before.

And as a parallel case, the King may exempt any subject from the payment of taxes imposed by act of parliament; as for instance, he might exempt him from payment of *tenths and fifteenths*, and tho' it may be objected that a charter of exemption of all men in general from the penalties of the militia act, would be totally to elude the act itself; yet it will not follow from thence, that a particular charter of exemption of a corporate number of men will not be good; for the first is but merely possible, and a thing which no King in his right senses would do; but the second is frequently done; it is true, this exemption may be said to do an injury to others, by laying a heavier charge on their lands, but it is more properly a charge on the person in respect of his lands, and therefore it is a good exemption.

Now

Term. S. Mich. 8 Georgii, 1724.

Now admitting that the power of the militia was entirely in the crown before the making this statute, (as certainly it was) and so declared by the statute 13 Car. 2. It is as certain, that the King might exempt any of his subjects * from serving in it, and if so, * P. 14. then the statute hath made no alteration of his power.

The old commissions of array, (a) on which this of the lieutenantancy is founded, were to array all those who are able to serve, and that those who were not able to serve in person should contribute to those who were; yet the King might exempt any of his subjects (unless in cases of apparent danger) from this service.

Collection 668. They continued in use till the end of Q. Elizabeth's time, when commissions of lieutenantancy were issued: 4 H. 6. 6. 21 E. 4. 56. Vaugh. 349. Lambert 135. a. Wilkins's Saxon Laws 217.

Tenants by knight-service were the first militia of this kingdom, it being a tenure instituted for the defence thereof; for those tenants (as my Lord Coke tells us) were always to be armed for that service, yet the King could exempt any of them from attending, unless it was where the danger was apparent, as to suppress a rebellion, or to repel an invasion; in which cases none could be exempted.

So the King might exempt particular persons from being jury-men, unless in a writ of right; it is true, he cannot exempt a knight from being of the jury, where a peer is concerned in the trial as a party; and the reason is, because by such an exemption there would be a failure of justice; and the subject hath a greater interest in juries than he hath in the militia.

Now as to this statute itself, it shews that the parliament did not intend by any implication to devest the King of any right or prerogative which he had before it was made; for the clause which concerns this matter is, that the King may from time to time issue out commissions of lieutenantancy, and that the lieutenants may array persons, and form them into companies, and conduct and employ them within such places for which they shall be commissioned, &c. as the King shall direct; which last words shew that the militia is still to be under his direction; and the beginning of this clause is, that he may issue out commissions for the several counties, cities and places of England and Wales, &c. but there is no time limited when; so that he is not obliged to issue them out every year, nor for all the counties, for he may do it for one county, and no more; and if in one county, he may exempt some persons there from this service, for there are no express words in this statute to devest the King of such power; and it is certain, that in the most minute cases of the King's prerogative it cannot be taken away by any general words in an act of parliament.

Now the power which the lieutenants have by this statute, is only a bare authority to arm, array and form persons into companies,

* P. 15. nies, &c. and as this power is given to * them by commission from the King, so he may suspend that power *ad libitum*; and it is certainly suspended by this *charter* granted to the *college of physicians*, because it exempts them from all powers in the said act, which must be from the actual service in the militia in person, and from providing another to serve in their place, the one being the primary, and the other the secondary service.

Besides, this statute was made to relieve, and not to charge the subjects; and it is absolutely necessary that a power of exempting persons should be lodged somewhere, it is daily done by the *lieutenants* themselves, and it is done by virtue of their *commission*; and if they may exempt, and not the King, this absurdity would follow, (*viz.*) that the derivative power is greater than the power from whence it is derived.

"If the King should be included within the general words of this act, yet in this charter there is a special *non obstante* of any law or statute to the contrary. And when an act expressly declares that the King's grant shall be void, tho' there be a clause *non obstante* in the patent, yet the King may dispense with such an act, if there be in the patent a clause *non obstante* of that statute.

Bro. Exempt. pl. 9, 14. Bro. Patent, pl. 16. Dy. 52, 269. 2 R. 3. 12. 2 H. 7. 6. 7 Co. 14, 36, 37. But there are many instances of the King's power of exemption, (*viz.*) the province of *Canterbury* granted the tenths, &c. to the King, and appointed a certain person to collect them; and the convention ordered, that no privileged person should be exempted from being a collector; yet one who had a charter of exemption from the King, was adjudged by virtue thereof to be exempted.

12 Co. 18. Hob. 214. Plowd. Com. 457, 501. a. b. Hardr. 443. Vaugh. 330. Sid. 6, 7. Vaugh. 349.

* Anno 22 Car. 2. c. 3. 6 & 7 W. 3. c. 18. 7 & 8 W. 3. c. 18. The * *subsidy bills* take notice, that no letters patent of exemption shall be taken to excuse or exempt any person from the *taxes*, or from the charge of any sum appointed to be paid by those acts; and that all *non obstante's* in bar of any act of parliament for the supply or the assistance of the King, are declared to be void.

Now since the *legislature* thought it proper to mention such powers of exemption, and to prohibit the effects thereof, this seems to prove that such powers remain in the King, if they had not been prohibited to be put in execution; tho' it doth not seem absolutely necessary to mention those powers in these acts, because the *subsidies* were given to the crown for particular uses mentioned in the acts themselves; so that if such patents of exemption had not been named in those statutes, † the King could not have discharged any man from the payment of those subsidies, because they must be applied to those uses for which they were given.

† 3 Mod. 96. 97.

As

Term. S. Mich. 8 Georgii, 1721.

As to this charter granted to the college of physicians, it hath been allowed and acquiesced under, ever since it was first granted to this very time, which is a strong presumption that it is good; and the statute 1 Georgii, which takes notice that such people who are exempted from serving in the militia, shall not be included in that act, is a strong proof that some are exempt.

* Neither is any particular person damnified by this exemption, but all people alike, for it imposes no new charge on them, but lessens the old charge as to some particular persons exempted; neither is it any manner of charge on the lands, for the statute requires a personal appearance of the people armed to defend the kingdom, and that when they appear, a computation may be made of what shall be sufficient to furnish them to serve in the militia. * P. 16.

(2.) The next point was, Whether there are sufficient words in this charter to exempt the physicians from finding horse and arms, as well as from their personal service in the militia; and as to that matter it is to be observed, that the charter recites the statutes of H. 8. and Jac. 1. and that the regulations therein wanted some new exemptions, and therefore it exempts the physicians from *watch and ward*, and from *serving on juries*, or *bearing or providing arms to serve in the militia*.

It is certain, that no man is bound to *bear arms* for another; he may do it voluntarily, or by an agreement, but not otherwise; and if the word *bearing* is sufficient to exempt a man from the personal service, the word *providing* must be nugatory, if it doth not exempt him from being contributory to the finding arms; and such a construction would make this charter of no effect.

(3.) The next thing to be considered is, Whether the defendant can justify under this *warrant*, it being to distrain for a penalty imposed, for not *bearing or finding arms to serve in the militia*; now this is offered by the defendant as one entire cause of justification, and as such it must be good for the whole; for if one part is good and the other bad, then the whole will be naught; and as to that matter, one part is not good, and therefore an entire penalty as to both can never be imposed; for if it should, then certainly the punishment would be against law as to that part which is not good; now one of the causes for which this penalty was imposed was naught, (*viz.*) For not *bearing arms*, when by the statute no man is bound to *bear arms*, if he finds another to serve in his place.

The remainder of the argument for the plaintiff was, What serjeant Pen-gelley said in Hillary term 1722. Pen-gelley divided the case into three points: 1st, What power the King had in the militia antecedent to the acts of 13 C. 2. c. 6. and 13 & 14 C. 2. c. 3. 2dly, What alteration had been made by those acts. 3dly, Whether the words of exemption in the charter are sufficient. † Cro. Eliz. 434. 11 Rep. 42.

the acts of 13 C. 2. c. 6. and 13 & 14 C. 2. c. 3. 2dly, What alteration had been made by those acts. 3dly, Whether the words of exemption in the charter are sufficient. † Cro. Eliz. 434. 11 Rep. 42. Sess. 27.

On the other side it was (a) argued, that the power which the King had to exempt the subject from the payment of the *tenths* then by *Warr.* And what is here reported to be spoken to the first and third points pro def. was said upon the last argument. *Reveries* as to first point: The prerogative of the King relating to dispensations, has of late years been disallowed; and it is expressly declared by the bill of rights, 1 & 2 W. & M. c. 2. that such dispensations are void. No power of exemption is reserved to the King by 13 & 14 C. 2. c. 3. *Goodwin* and *Hals*, which allowed a dispensation of the test act, and many other cases have of late years been denied for law. However if this charter were a good exemption in point of law, yet it was only so during the life of the King who granted it, but will not bind his successors.

Econtra. (a) By *Reveries* first,

Term. S. Mich. 8 Georgii, 1721.

and *fifteenths* granted to him by act of parliament, doth not come up to this case, because the King had an entire interest vested in him as to those things.

So where the *province of Canterbury* granted the *tenths* to the crown, and appointed one to collect them, and the convocation
* P. 17. * ordered that no privileged person should be exempted from being a collector, yet one who had a charter of exemption from the King was excused; this likewise doth not concern the case now in question, because the convocation had not power to make any man the King's purveyor; and the *Bill of rights, anno 3 Car. 1.* doth entirely condemn all those exemptions.

It hath been admitted on the other side, that the King could not grant these charters of exemption in extraordinary cases; and that he cannot exempt a *knight* from being a *jury-man* where a peer is a party in the cause; and certainly it cannot be pretended that this can be so much for the good of the publick, as the defence of the kingdom by the militia; and there is a great difference between exemptions and excusing persons at discretion.

It is true, the King may exempt men from *portage* or *murage*, because such exemption may be lawfully made in opposition to that authority, which take upon themselves to build bridges, &c. but the King cannot exempt them from being contributory towards the support of old bridges, because they were subject to such contribution prior to any exemption; so in the principal case the charge was vested prior to the charter of exemption, and for that reason it cannot be good.

Plow. Com.
487.
12 Rep. 29.
W. Jones 106,
106, 286.

There is likewise another reason why it cannot be good, and that is, because it is to exempt men from that charge which the law hath provided for the publick safety of the kingdom, in which every man hath a benefit; and therefore it is reasonable that every man should be contributory to it.

(2.) As to the second point; the words of this charter exempt the physicians from *bearing or providing arms* to serve in the *militia*, which seems to be only a personal discharge, and that shall be intended by the word *bearing*, and from furnishing himself with arms, by the word *providing*; but he is not discharged from being contributory to find arms for another to serve in the *militia*.

Cro. Eliz.
447, 449.

Besides, the King's charter cannot exempt a man from a thing which concerneth the whole right of the subjects, as this statute doth, for it is for the publick safety of all men; it is true, he may exempt men from any thing which concerns his private right, or which is a branch of his prerogative, or wherein he himself is principally concerned; but it doth not follow, that because he may grant such exemptions, therefore he may exempt where the whole community are concerned.

* P. 18.

* Now this statute doth not bind any man to a personal service in the *militia*, nor is it a charge on the person, but only in respect of his lands; therefore where a man is protected in the possession and quiet

quiet enjoyment of his lands, he ought in reason, as well as in law, to be contributory to the charge of such protection.

(3.) The last objection was to the *warrant*, (*viz.*) *that the defendant could not justify under this warrant, &c.* but it was argued, that the warrant was good to levy the penalty for not *bearing or providing arms*; it had been otherwise if it had been for *not serving, or finding one to serve in the militia*, because he who serves is not to contribute to the finding another to serve; but by the warrant the penalty was to be levied for not appearing, being duly summoned, as well as for not *bearing or providing arms* to serve; so that upon the whole matter this is a good warrant, and by consequence a good justification under it.

“*Baines* in reply—The bill of rights declares only such dispensations shall be void, which plainly proves a precedent right in the crown to grant dispensations; and that act does not take away any right the King had of granting dispensations, but in such cases only where a *non obstante* was necessary to be in the charter. And in many cases the King may grant dispensations without a *non obstante*.”

The court upon this first argument declared this to be a cause of *Curia*. great difficulty and consequence, as concerning the prerogative of the King, and the general right of the subject, and for that reason it ought not to be determined upon a *case stated*, because upon such a proceeding the judgment of the court would be final, and not to be avoided by the party who should think himself aggrieved either by writ of error or appeal; therefore the court proposed that both parties would consent to make it a *special verdict*, and that it might be argued once more before judgment given; upon which a writ of error might be brought in parliament by either side against the judgment, and there to be finally determined.

But upon this first argument the chief justice was of opinion, that the King by his prerogative could not dispense with an act of parliament which was made for the publick good of the whole nation; but the question in this case was, whether this statute had devested the King of any part of his prerogative, or whether it was made to ease him of the care of arraying the *militia*, and entrusting the lieutenants and other officers therewith; for if it was, then it did not devest him of any authority he had before the act.

Now he was of opinion, that this charter did not exempt the physicians from being contributory to the finding men to serve in the *militia*, tho' probably it might exempt them from any personal appearance upon a summons duly served; but admitting that he might exempt them * from personal duties, yet it cannot be in- * P. 19.ferred from thence, that he might exempt them from being contributory to others to perform those duties which are required by an act of parliament, especially where the subject hath an interest that such duties should be performed, or a loss if they should not, and the

Term. S. Mich. 8 Georgii, 1721.

the better opinion seemed to be, that the King could not exempt in such cases.

That in the principal case, the contribution to be made to the finding a man with arms to serve in the militia, is a charge upon the lands as well as on the persons of the owners; and if this charter of exemption should be good, it would encrease the charge on all the lands of persons not exempted, which would be a very great damage to such persons, because the physicians who are exempted are a considerable body of men in every county; for which reason it would be very hard if the King had power to lessen the tax imposed upon one man, and charge it upon another.

Besides, the King cannot exempt in any case where the subject hath an interest, as where particular persons are bound by prescription or tenure to repair bridges, the King cannot exempt them from repairing, because all the subjects have a common benefit to pass and repass over publick bridges.

* "But it never came on afterwards."

It was adjourned for a farther * argument.

The King *versus* Hutchinson, "Mayor and Aldermen of Carlisle."

Mandamus to restore a man to his freedom in a borough. Post 99.

THIS was a *mandamus* to the mayor and common council of the borough of *Carlisle*, to restore one *John Sympson* to the office of a capital burges of the said borough, &c. "They return this charter of corporation, with a power to the mayor and aldermen to remove any capital burges for any *misdemeanor*, and then set forth an amotion by them for bribery at an election, &c. for mayor of the corporation."

"The two points in this case were,

(1.) "Whether the offence for which he is removed be *indictable* at common law.

(2.) "Whether, if it be so, the corporation (who have expressly a power to remove) can make such removal without a *precedent conviction*."

And now by his counsel he insisted, that this was not a sufficient cause to remove him, because *bribery* is a crime punishable at common law; and it is against *Magna charta* to remove him from his freedom before he is convicted of the said crime; if the law should be otherwise, what security can any man have against the insults of power; but it is plain, and so it was adjudged in * *James Bagg's* case, that a freeman shall not be disfranchised, unless it be by charter or prescription, if he is not convicted in due form of law; and where he may be disfranchised by * charter or prescription, and without conviction, it must be for an act against his duty and oath relating to his office, or not doing his office; as a justice of peace not

* 11 Rep. 93.

* P. 20.

Term. S. Mich. 8 Georgii, 1721.

not attending the sessions; or where a judicial officer is a common drunkard, or for any other misdemeanor meerly against the duty of his office, and which is no crime at common law; for there is a difference between the doing an unlawful act, and the not doing his duty relating to his office, the one being a crime, and the other only a contempt, "as to the first point."

"As to the second point, *Pratt* L. C. J. and *Powis* held, that Curia. there ought to have been a previous conviction. But *Eyre* and *Fortescue* held that this offence being plainly against his duty and oath of burgeses, the corporation might remove him without conviction. And they all agreed that a burgeses may be removed for an offence for which no indictment will lie.

"*Per Pratt*—If a burgeses is convicted upon an indictment for an offence at common law, this court may order, as part of the punishment, that he be disfranchised.

"*Eyre* and *Fortescue* denied it.

"*Per cur'. adjournatur.*" V. post 99.

The Lord Coningsby's case.

THE Lord *Coningsby* brought an ejectment against some of his tenants, and moved for a trial at bar; thereupon the defendants by their counsel moved, that * the plaintiff being a peer of the realm, and consequently not to be attached, if the verdict should be against him, might be obliged to make some responsible person to be his lessee, or otherwise that he would waive his privilege. Motion for a peer to waive his privilege. See Stra. 548. * P. 21.

But the court rejected the motion, for if the plaintiff was not worth any thing, he could not be obliged so to do; and it would be unreasonable that his peerage should be a loss to him, since every subject hath a right by birth to sue in the King's courts, where no distinction is to be made of persons. "Upon affidavit that the defendant was a privileged person, he was ordered to give security for the future payment of his rent." 10 Mod. 383.

There was another cause in the Exchequer in *Trinity* term following between the same persons, only in that cause the noble lord was defendant; and by rule of court made on a *Thursday* in the said term, it was ordered that the defendant should plead in four days after, and the plea came into the office on *Tuesday* after, and not before, which the attorney for the now plaintiffs refused; and it was insisted on by their counsel, that it ought not to be received; for though by the course of the court the defendant hath four days exclusive to plead, yet such custom will not warrant five days exclusive, which was this case, because *Sunday* shall be reckoned as one of the days, as well as it is one of the fourteen + days where notice is given of a trial; it is true, pleas have been received on the fifth day, but never where the matter was contested. Sunday not a day to plead. + Ten days are now sufficient by stat. 14 Geo. 2. c. 17. s. 4.

Term. S. Mich. 8 Georgii, 1721.

Curia.

The court answered, that the pleas which are now put into the respective offices of the several courts were originally pleaded in court; and that the defendant may as well plead on the first as on the second day, or the fourth day; but that now by the course of the court, if the defendant doth not plead within four days, the plaintiff may sign judgment for want of a plea; but these four days must always be reckoned such days wherein the defendants may plead, and when the offices are open; and therefore Sunday is never reckoned one of those days, because neither courts or offices are then open.

And this is not like the case mentioned on the other side, where Sunday is reckoned one of the fourteen days for giving notice of trial, because a man may prepare for his journey, or (a) come up to London on that day, as well as on any other day of the week; and for this reason it was resolved, that the plea should be received.

(a) But quere whether he may; and see Stra. 406. Com. Rep. 345. pl. 175. * P. 22. † 2 Salk. 624. pl. 2.

* Nota; This is contrary to the case of † *Asbmole versus serjeant Goodwin*, where it was held, that as to rules of pleading, Sundays and holydays should be accounted as other days of the week.

Mr. † Lister's case, 17 Nov.

† This captain Michael Lister

was the man who afterwards fought with Lord Brooks, and was almost killed by him.

Agreement between husband and wife to live separately. Stra. 478. Chanc. Prec. 406. pl. 309. Gilb. Rep. 152. Bur. Rep. 45. S. P. accord. I believe the allowance was rather from her to him.

MR. Lister married with the Lady "Rawlinson, who was a widow, and had before her marriage with Lister settled her estate in her own power and out of his controul," and afterwards there being some disagreement between them, he by a proper writing duly executed, covenanted to allow || her so much every year for her maintenance, and that she might live separately from him, to which she agreed, and accordingly they lived apart for some time; the husband "pretending a desire to be reconciled to his wife, but in fact only wanting more money of her," she refused; whereupon he with another person who assisted him, forced her into a coach as she was coming from church on a Sunday, and carried her into the Mint, "and kept her in custody under a strict confinement."

And now she being brought into court by *habeas corpus*, her husband moved by his counsel, that the court would not interpose between husband and wife, that she could not deny herself to be his wife; and that by law the husband hath a coercive power over the wife.

Curia.

An agreement between husband and wife to live separate, and that she should have a separate maintenance, shall bind them both till they both agree to cohabit again, and if the wife is willing to return to her husband, no court will interpose or obstruct her.

But as to the coercive power which the husband hath over his wife, it is not a power to confine her; for by the law of England she is entitled to all reasonable liberty, if her behaviour is not very bad; and therefore she shall now be set at liberty, if it is her pleasure so to be. She answered, that she desired to be at liberty; and thereupon she was discharged out of the custody of her husband, and went out of court with her son; but that he (the husband) should have leave to write to her, and to use any lawful means in order to a reconciliation, provided she was willing to see him, and that her children or servants should not hinder him unless by her order; but that whenever she permitted him to come to her, he should not offer any violence or uncivil behaviour to her person.

* Smith, *versus* Trigg, at Nisi prius, before Parker Lord * P. 23.
Ch. Just. Tuesday, 28 Nov.

THIS was a case referred out of the court of Chancery, for the opinion of this court, and the point was, whether one *Jane Day* took the lands in question, either by purchase or descent. The case was thus, (*viz.*) *Hugh Hunt* being seised in fee of the premises in question married *Jane* the widow and relict of *John Trigg* the lessor of the plaintiff's great uncle. That after the marriage *Hugh Hunt* surrendered the premises to the use of his will, and afterwards devised the same to *Jane* his wife and her heirs, and died without issue by her; after whose death *Jane* was admitted and likewise surrendered to the use of her will, and devised the same to *Jane Day* her daughter and heir by her first husband *John Trigg*, and to her heirs for ever, and soon after died. That *Jane Day* before admittance made her will, and thereby gave the premises to the defendant in the words following: "Item, I give and bequeath all my freehold and also all my copyhold estate, which I intend to surrender to the use of this my will, lying in Edmington in the county of Middlesex, unto my cousin *Thomas Trigg* (the defendant) for and during the term of his natural life, with remainder over." That after making the will, and before any court-day, *Jane* the deviser died, having never surrendered to the use of her will; but the defendant, who is the devisee, is notwithstanding admitted under the devise.

And it was resolved, that *Jane* was in by descent, because she was heir at law to the testatrix; and that where two rights meet together in one person, (as they did in this case) the one being by the devise, and the other by descent as heir at law, the descent is the most noble means to come to an estate, and therefore the law adjudges, that the best title shall stand.

So where a feoffment is made to several uses, the reversion in fee to the heirs of the feoffor, in such case the heir shall take the reversion

Lands where they shall be taken by purchase, and where by descent. Stra. 487.

See the opinion of the court more at large, in Stra. 489.

Term. S. Mich. 8 Georgii, 1721.

Co. Lit. 22. b. 23. a. fion by descent, because it was part of the old estate of the feoffor; for so much of the use of the lands which he did not dispose of by the feoffment still remained in him as part of the old estate.

But in the case of a will, if a man devise any other estate to the heir at law than what he was to take by descent; (as for instance, if the testator deviseth a less estate to him, or an estate in fee to arise upon a condition,) there it is otherwise.

* P. 24.

* D E

Term. Sanct. Hill.

Anno 8 Georgii, 1721.

Button *versus* Heyward & ux'.

Case for slanderous words.
Vin. Abr.
507. pl. 40.
in notes.
Cited in
2 Barnard.
K. B. 84.

THE plaintiff brought an action on the case against the defendants for slanderous words spoken by the wife, (*viz.* *George Button* (the plaintiff) *is the man who killed my husband*, her first husband being dead; after a verdict for the plaintiff, it was moved in arrest of judgment, that these words are not actionable, "for the uncertainty of the word *killing*; for it "might be justifiable, or in his own defence, or *per infortunium*; "and shall not be presumed felonious, and so made actionable by "intendment; for it is a maxim that words shall be taken *in miti-* "ori sensu. *Moor* 573. *Cro. Jac.* 306. *Hob.* 6, 77, 177. *Cro. Jac.* 315. 4 *Co.* 20. a. *Rol. Abr.* 72, 73, 77. *Cro. Jac.* 215, 331. 2 *Salk.* 694, 696. (2.) *Adtunc defuncti* in the declaration "refers to the time of the declaration, not to the time of speaking "the words. *Hob.* 6. *Cro. Jac.* 331. (3.) The words in the "last count, (*viz.*) *I know the man that killed my husband: it was* "G. B. are spoke of a past time, perhaps several years ago; and "so not actionable. *Rol. Abr.* 48. *Vent.* 50. *W. Jo.* 48. *Wills* "v. *Wills*, *Trin.* 7 G.

"*Wyndham contra*—The words in themselves import a voluntary "and unlawful killing by necessary inference: and in the later "reports have always been held actionable. *Cro. El.* 49, 823. " *Cro. Jac.* 166. *Lev.* 277. 4 *Co.* 15. 2 *Lev.* 150. *Salk.* 695, 697.

Term. S. Hill. 8 Georgii, 1721.

“ 697. (2.) There is no necessity to aver the death of her husband, for the words imply it. *Cro. El.* 317. *Cro. Car.* 489.

“ *Pratt* Lord Ch. Just. There can be no question but at this day these words are actionable; in former times words were construed *in mitiori sensu* to avoid vexatious actions, which were then very frequent: but now *distinguenda sunt tempora*, and we ought to expound words according to their genuine significations to prevent scandals, which are at present too frequent. The words themselves ascertain the death of the person: and therefore there can be no necessity for any averment. We are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and are equally liable to two distinct interpretations, we ought to construe them *in mitiori sensu*: but we will never make any exposition against the plain natural import of the words; killing signifies a voluntary and unlawful killing, and is actionable. There are a great many very odd cases in the books.

Powys Justice of the same opinion.

“ *Eyre* Justice: The words are to be taken in their worst sense, for a malicious and felonious killing. The word killing of late years has been held actionable.

“ 2dly. As to the second question, whether any averment of the husband's death is necessary; the defendant's words have ascertained the death. In the time of King *James* the First this exception did prevail, but never of late. *Sid.* 52, 53. In the case of *Jacob* and *Miles*, *Cro. Jac.* 343. *ad tunc defunctus* was held insufficient, because it referred to the time of declaration: but that point has been often over-ruled. In that case it was also resolved, that where the jury gave several damages for the words spoken at several times, and the judgment was entire for the damages and costs, the court might reverse the judgment *quoad* the damages given for the words not actionable, and affirm it for the rest, and all the costs; which resolution has since been denied for law, for that the judgment must be reversed or affirmed *in toto*, so the case is of no great authority in any respect.

“ *Fortescue* Justice: The rule of construction of actions for words is very different from what it formerly used to be; the maxim for expounding words *in mitiori sensu* has for a great while been (a) exploded, near 50 or 60 years; whenever words are disreputable they are actionable. It was the Lord Chief Justice *Holt's* rule, to make words actionable whenever they sound to the disreputation of the person of whom they were spoken; and this was also *Hale's* and *Twissden's* rule; and I think it a very good rule. If the killing was justifiable, why did not the defendant justify the speaking the words? In the case of *Baker v. Pearce*, (b) it was held, that words are to be taken *in malam partem*.

(a) *Skin.* 364.
Fortesc. Rep.
207.
10 *Mod.* 197.
198.
Gilb. Cas.
117, 286.
Ses. Cas. 261.
Vin. Abr.
500. pl. 1.
507. pl. 40.
(b) 2 *Salk.*

695. pl. 6. 2 *Lord Raym.* 959. 6 *Mod.* 23.

Term. S. Hill. 8 Georgii, 1721.

" 2dly. An averment is not necessary. *Vent.* 117. The court
" will intend the party dead unless it appears upon the record that
" he was alive.
" By the court, judgment for the plaintiff."

* P. 25.

* Spiller & Ux' *versus* Adams, or Andrews. †

Infant admitted ad prosequendum.

THE plaintiff brought a writ of dower against the defendant who was then an infant, and admitted *ad prosequendum* by his next friend, and pleaded *uncore prift*; and judgment being given for the plaintiff in the Common Pleas, *Adams* brought a writ of error in *B. R.* and assigned the matters following for error.

(1.) First, That the admittance *ad prosequendum per prochein amy* was wrong, for it should be *ad defendendum per guardianum*.

To which it was answered, and so resolved by the court, that true it is, an infant often prosecutes *per prochein amy*; but yet an admittance *ad prosequendum* is good, even where he is defendant; for it is to prosecute his plea by which he defends himself against the plaintiff.

In Dower
Uncore prift
is a good plea.

(2.) Then it was objected, that damages were given to the defendant, which ought not to be done, because he pleaded *uncore prift*, which is no plea in dower, unless an actual assignment was made.

To which it was answered and so ruled, that damages in this case were well given, tho' the defendant had pleaded *uncore prift*, because damages may be given *occasione detentionis dotis*.

* 6 E. 1. c. 1.
10 Rep. 117.
Rast. Ent.
399.
2 Cro. 140.
Salk. 108.

(3.) It was objected, that tho' damages might be given in this case, yet it ought not to be upon the judgment *quod recuperet dotem*, this being in a real action; for before the statute of * *Gloucester* no damages were allowed in a real action; therefore the damages ought to be given from the time of the disseisin till after the writ of inquiry returned by the sheriff, if there was no wilful delay by the demandant.

† 20 H. 3.
See 1 Inst.
37.
Dyer 378.
Brownl. 217.
2 Cro. 640.
Sid. 446.
1 Vent. 73.
Lutw. 719.
2 Sand. 94.

To which it was answered, and so resolved, that by the statute of † *Merton cap. 1.* the widow in a writ of dower shall recover the value of her dower in damages from the death of her husband to the day that she recovers the dower itself; that is, *usque diem qua ipsa recuperaverit per judicium Curie seisinam suam*, which by intendment of law is the day on which she had judgment *quod recuperet dotem*, for from that day she is accounted in the possession or seisin of her dower.

So the judgment was affirmed.

Read

* Read *versus* Marshall.

* P. 26.

" TRESPASS on two counts; 1st. for breaking the plaintiff's house, and taking his goods. 2^d. laid on a different day for beating his wife, & *ad tunc* & *ibidem* bona & catalla ipsius quer' cepit & asportavit. Judgment by default; and on writ of inquiry intire damages were given."

" Belfield serjeant moved in arrest of judgment, because no damages ought to have been recovered for beating the wife, since she is no party to the action, nor has the plaintiff laid any special damage, as *per quod consortium amisit*, &c. to entitle him solely to this action. If these damages should be recovered, there may be two recoveries for one assault, for this action would be no bar to any action to be brought by the baron and feme jointly."

" Gapper contra: The assault on the wife is only laid as aggravation of the damages, and not as a distinct trespass. Salk. 119. pl. 12. 2 Salk. 640. pl. 10. 2 Lord Raym. 1031. 11 Mod. 265. 10 Rep. 131. a. Cro. Jac. 664. pl. 16. Dix v. Brookes. Fortesc. Rep. 378. Stra. 61."

" Cur. * inclined this declaration good; but *advizare vult*."

* Fortesc.
Rep. 377.

The King *versus* The Marquis of Powis. *

UPON a writ of error to reverse an outlawry for high treason, the error assigned was, that the process of outlawry against the Marquis was directed to the sheriff of London, when he (the Marquis) lived in the parish of St. Giles in the county of Middlesex, which is an error in fact; for the process of *capias* must be always directed to the sheriff of the county where the party lives, and for this reason the outlawry was reversed, upon the confession of the Attorney General.

N. B. There were several exceptions in point of law taken to the record, in this term.

and it was determined in Mich. 9 Geo.

* This cause
came on
Wednesday,
11 Apr. 8
Geo. 1722.

Outlawry for
high treason
reversed on a
writ of error.

This case was
first argued in
Hil. 7 Geo.
See Stra. 536.

* The King *versus* The Dean and Chapter of Trinity-Chapel in Dublin. * P. 27.

THE dean and chapter, &c. denying Dr. T. S. the archdeacon of, &c. his seat therein, and his voice in the chapter, he brought a *mandamus* in the King's Bench in Ireland, directed to them, suggesting that his predecessors time out of mind had enjoyed the said liberty, and that the franchises and liberties of their corporate body were confirmed by letters patent of H. 8. &c.

Mandamus by
an archdeacon
to be restored
to his seat in
the choir, a
writ of error
will not lie
upon it.
Fortesc. Rep.

The 329.

Term. S. Hill. 8 Georgii, 1721.

The dean and chapter made a return to the effect following, (*viz.*) That by the same letters patent they had power to make *by-laws* for the benefit of their corporate body; and that they made a by-law on such a day, &c. that no person should be admitted a member of their body, unless he had taken the oaths of canonical obedience, and to keep the secrets of the said chapter, which the archdeacon denied to take; and thereupon they refused to admit him.

This return was adjudged insufficient in the said court in *Ireland*; whereupon they granted a peremptory *mandamus*, and then the dean and chapter brought a writ of error in the King's Bench here.

And it was argued in their behalf,

(1.) First, That the cause of denial, as returned by them, was a good and sufficient cause.

(2.) That a *mandamus* was not the proper remedy for the archdeacon in this case.

As to the first point the court adjudged, that the dean and chapter had not returned a sufficient cause, but that they had usurped a jurisdiction, by tending or requiring an oath to be taken, which could not be done but by a court of judicature, or by some special words in letters patent, giving them authority so to do, which authority could not be implied by any general words, expressing their power to make by-laws.

But the chief point was, whether a writ of error would lie upon a peremptory *mandamus*.

Poph. 176.
Mod. Rep.
81, 281.
Lev. 291.
* P. 28.

And it was argued against the dean and chapter, that a *mandamus* would not lie, because it was a prerogative writ, upon which the particular right of the subject was never yet determined; for it is grantable by the court only in cases of * a publick nature for settling the possessions of men, and not between any parties in interest, and therefore no restitution can be granted upon this writ; it is no more than a command to a person to do his duty, as to admit another to an office, or to some freedom, or to some place or freedom, which belongs to him to whom it is granted, and for which he hath no remedy by any other action. Now in the principal case, as to a place in the chapel and voice in the chapter, it is no more than a *franchise* belonging to the office of archdeacon, for which no *assise*, *ejectment* or *quare impedit*, will lie; and tho' he might maintain an action of trespass on the case for it, yet that is no remedy, because in such cases damages are only to be recovered, and not the franchise itself.

Lev. 291.

Roll. Abr.
481.
Lev. 119.
Vent. 188.
W. Jo. 199.

It is true, a *mandamus* will lie to restore a man to his priority of freedom; it may be directed to a bishop to induct a man into his prebend, and to give oil to a priest in baptism; but such writs, and others of the like nature, shall never be controlled by writs of error, for

Term. S. Hill. 8 Georgii, 1721.

for if they should, many inconveniencies would follow, because it is usual to grant a *mandamus* to parish-officers, and to magistrates, to deliver the ensigns of their temporal offices, or to command them to do their duty in their respective offices; and if writs of error would lie on such commands, it would admit of unsufferable delays.

A writ of error was never yet granted where a fine was imposed, or commitment for a contempt, or upon the award of any writ by any court of justice, in which cases the properties and liberties of the subject are concerned. *Hardr.* 401. And if it is not grantable in a criminal Action, where a man is deprived of his liberty, there can be no reason why it should be granted in a civil action, as in this case; it is true, this matter was contested in the case of the *Constables of Ailsbury*, (*viz.*) whether a writ of error would lie upon the return of an *habeas corpus*, but it was not determined.

It is likewise true, that by a late * statute, a traverse is given to the return of a *mandamus*, as if it had been an action on the case; but yet that doth not make it an action on the case.

may plead to, or traverse the facts in the return; and the person who made the return may demur.

* 9 Annæ, cap. 20. by which it is enacted, that the prosecutor take issue, or

“ It was objected, that a writ of error might lie without delay-
“ ing the party, for it might not be a † *superfedeas*.

“ The form of entring the award of a peremptory *mandamus* is
“ an argument that no writ of error lies, for they are never entered
“ *Ideo consideratum est.* 16 Car. 2. Rotulo 35. *Maidstone corporation*,
“ 35 Car. 2. 10 W. 3.

“ When the court denies a peremptory *mandamus*, there is no
“ pretence that any writ of error will lie, so that the consequence
“ will be that a writ of error lies only of one side.

† But every writ of error is a *superfedeas*.
Sid. 45.
Cro. Jac. 342.
Stroud v. Palmer, Trin. 2 Geo.

On the other side it was argued, that tho' in this case a writ of error would not lie upon the first *mandamus*, because it was in the nature of an interlocutory judgment, * and no more; yet it must * P. 29. lie upon this *peremptory mandamus*; for tho' it was formerly but a letter from the King, yet now it hath obtained the sanction of an original writ; and like such writ, if it bears *teste* out of term, it is void.

The reason of the law seems to be plain, that a writ of error will lie upon a peremptory *mandamus*, for it will lie upon any judgment by which the defendant conceives himself to be aggrieved or damnified, unless he hath another proper remedy for relief; but the dean and chapter in this case have no remedy but by a writ of error; for if their return to the first *mandamus* was good, and ruled to be otherwise, they are pinned down by such judgment; and tho' they are wronged by it, they have no remedy.

Lev. 91.
Vent. 205,
212, 266.
Sid. 44.
Mod. 258.

Term. S. Hill. 8 Georgii, 1721.

Curia.

The court was of opinion, that the *right* of any person was not to be determined upon a *mandamus*; it gives a remedy where there is a seeming probability for it, and it settles people in their possessions, so that they may be able to defend their right, or by virtue thereof to bring any action for things incident to the possession; and if a writ of error should lie in such cases, it would entangle all the publick acts of annual officers in most corporations and parishes.

It is against the nature of a writ of error to lie on any judgment, but in causes where an issue may be joined and tried, or where judgment may be had upon a demurrer, and joinder in demurrer, and therefore it would not lie on a judgment for a *procedendo*, nor on the return of an *babeas corpus*.

It is true, if the defendant in error had traversed the return of the dean and chapter to this *mandamus*, as by the statute 9 *Annæ* he might, in such case the writ of error would have been good, because then a final judgment might be given; for upon the traverse of the facts in the return, the other side may take issue or demur; and such proceedings might be had, as if the prosecutor of the *mandamus* had brought an action on the case for a false return; and if he had a verdict or judgment on a demurrer, he shall recover his damages and costs, upon which judgment a writ of error would lie; but it was never yet determined that it would lie upon a peremptory *mandamus*, and therefore it was resolved by the whole court, that it would not lie.

Fortesc. Rep.
329.

Afterwards a writ of error was brought on this judgment in the house of Peers; and the Lord Chief Baron, who attended there, together with seven other Judges, acquainted the Lords in Parliament, that all the Judges of *England* were of opinion, that a writ of error would not lie, * and thereupon 21 *Aprilis*, 10 *Georgii*, anno 1724. the judgment of the court of King's Bench was affirmed.

* P. 30.

Muck's case.

Action for
scandalous
words.

AN action on the case was brought against *Muck* for slanderous words, (*viz.*) *Muck stole a sheep of his* (*innuendo* of the defendant), and that it was not the first he stole by an hundred; upon not guilty pleaded, the plaintiff had a verdict; and the defendant moved in arrest of judgment, that the words were not actionable, (*viz.*) *Muck stole a sheep of his*, which must be intended *Muck's* own sheep, for the particle *his* must refer *ad proximum antecedens*, which is *Muck*, so that these words are repugnant; for a man cannot steal his own sheep; like the case in *Roll. Abr.* 74. where an action was brought against husband and wife, for words spoken by the wife, (*viz.*) that the plaintiff *stole some of her goods*: adjudged not actionable, because a married woman cannot have any goods, for they are the goods of the husband.

But

Term. S. Hill. 8 Georgii, 1721.

But in the principal case the court over-ruled the objection, and held the words actionable as laid in this declaration.

Carvell one, &c. *versus* Manly, or Manby.

IN an action of *assault and false imprisonment* for seven months from 1st October. "The defendant justified for the whole time by virtue of a writ of *capias utlegatum, quæ est eadem transgressio, captio, imprisonment, & detentio, &c.* and then traversed" *absque hoc*, that he is guilty at any time after the return of the writ. * The defendant who sued out the writ justified under it; and upon a special demurrer to his plea the plaintiff had judgment in the Common Pleas, because the justification was under a writ taken out *at such a time*, and the defendant did not conclude his plea with *prout patet per recordum*, nor *traverse* that he did imprison the plaintiff at *any other time*; and now upon a writ of error in B. R. upon that judgment, the error assigned was, the want of a *good original*; it is true, there was an *original*, but it was not *returned*, and therefore it is void.

Where a plea need not conclude *prout patet per recordum*.
* Fortesc. Rep. 379.
Stra. 694.

"The general errors were assigned: and also, that no bill was filed, but upon alledging diminution, a bill was returned, filed of another term; but no return to that bill was certified.

To which it was answered, that there are two sorts of returns, one made on the roll, and the other by the sheriff; now tho' there was no return made by the sheriff on this original, yet there being one filed on the roll, and certified from thence as returned, that is sufficient to make it a good original.

And as to the objection against the plea, (*viz.*) that the defendant had justified under a writ, and did not conclude * *prout patet per recordum*; and that he had not traversed the imprisonment at any *other time* than upon the writ sued out at *such a time*; it was argued, that if the action had been brought against the *sheriff*, and he had justified under the writ, he must have concluded his plea with *prout patet per recordum*, because it would not have been a record, if he had not returned the writ; but though he never returned it, it is still a good justification for the defendant in this action.

* P. 31.

But it is not absolutely necessary for a defendant to conclude his plea with *prout patet per recordum*, because a writ may be lost.

And as to the other objection, that the defendant did not traverse the imprisonment at any *other time, &c.* that is only *surplusage*; for if the justification is good, the traverse would be wholly immaterial.

Lev. 211.
3 Lev. 227.
Lut. 1452.

† The *original* gives jurisdiction to this court, and by consequence if that is not returned, the court hath no jurisdiction in this case; and the cause cannot properly be said to be in court; but if the

Curia.

sheriff

Term. S. Hill. 8 Georgii, 1721.

sheriff never returned the writ, how could the defendant in this action plead *prout patet per recordum*? therefore his plea must be good without such conclusion, and if his plea is good, then the traverse would be immaterial; so the judgment in the Common Pleas was * affirmed.

* In Mich.
term, 9 Geo. 1.
Fortesc. Rep.
380.

Glynn *versus* Yates.

Bail are liable
where the
principal died
before the re-
turn of the
second scire
facias.

Stra. 511.
2 Ld. Raym.
1452.

† Moor 775.
Cro. Jac. 97.
165.
Bull. 331.
W. Jones 138.
Hob. 210.

T. Raym. 14.
6 Mod. 238.

* P. 32.

THE case was, *ff.* The principal *died* not having surrendered himself before the return of the second *scire facias*; and upon a motion, the question was, whether the bail are liable to the debt.

It was argued against them, that they were liable, for in strictness of law, upon a *capias* awarded and filed against the principal, and *non est inventus* returned, the bail afterwards are liable; it is true, by the favour of the court, they have time to render the principal till the return of the second *scire facias* against them; and therefore that matter ought to be pleaded to the *scire facias*, and not to be allowed upon a motion; but it cannot be pleaded, because it is not law.

To which it was answered, that if it is not law, and therefore not to be pleaded, it is the greater reason that it should be determined upon a motion; for the death of the * principal being the act of God, it shall never be prejudicial to the living, and the plaintiff hath no damage by the death of the principal, because he might have died if he had been in gaol; but it would be a great damage to the bail, if they should not be discharged by his death.

Pratt Ch. Just. The bail are bound by their recognisance to render the principal where judgment is had against him, or to pay the condemnation money; but by the course of the court, the principal hath time to render himself in discharge of the bail till the second *scire facias* against them is returned; and here the act of God intervened, (*viz.*) the principal died, so that he could not render himself within that time.

Eyre Just. It is true, the grace of the court is usually extended to the bail, where the principal did surrender himself, but never where he did not; this was the course of the court when *Popham was Chief Justice*, but it was altered by my *Lord Coke*, and altered again in *Crook's time*; that if the principal did surrender himself before the return of the second *scire facias* against the bail, they should be discharged; but the indulgence of the court never extended farther.

Cro. El. 738.
Salk. 101.

It is wrong to say, that the plaintiff hath no damage by the death of the principal dying before the time he had to surrender himself; for it is seen by daily experience, that men will pay their debts rather than be committed; and so might the principal in this case, rather than to be rendered in custody.

Term. S. Hill. 8 Georgii, 1721.

Besides, the plaintiff is a stranger to the bail, and there is no trust or privity between him and them; but there is a great trust between the principal and the bail, so that it seems very reasonable they should suffer in this case rather than the plaintiff, who is an innocent person; for it is *probable* they may have counter-security from the principal to indemnify them; and therefore it is more proper for them, than for the plaintiff, to sue his executor or administrator upon such counter-security; for it is to be presumed, that by reason of that trust which is between them, they may know more of his concerns than it is possible for the plaintiff to know.

So last day of the term judgment was given for the plaintiff against (a) the bail.

(a) S. P. record' in 2 Stra. 717 and also

in *Simons v. Parminter's bail*, B. R. Mich. 1750.

* *Atkinson executrix, &c. versus Coatsworth.*

* P. 33.

UPON a writ of error on a judgment in an action of covenant, the case was, *ff. One Snell* by indenture of lease demised lands to *Atkinson* the testator for a certain term of years, rendering rent, and performing other covenants therein mentioned; and afterwards *Atkinson* made an under-lease of the premises to the defendant *Coatsworth*, who therein covenanted with the said *Atkinson* to perform and keep all the * covenants in the original lease, to be kept and performed by the said *Atkinson*, his executors, &c. or assigns.

Estoppel where it is good. Sura. 512.

* Of which the payment of the rent was one.

Afterwards *Atkinson* having made his wife (the now plaintiff executrix) died; and the rent reserved on the original lease not being paid, she the said executrix brought an action of covenant against the defendant *Coatsworth*, and assigned for breach the non-payment of the rent, &c. and upon the general issue pleaded, the cause was tried at the assises in *Durham*, and the plaintiff had a verdict and judgment; and upon a writ of error brought by the defendant, the error assigned was, for that the plaintiff in her declaration had not set forth, that *Atkinson* her testator did execute the *original lease on his part*, for if it was not signed and sealed by him, then it was not his deed; it is true, it being executed by *Snell*, it had all the essential qualities of a deed; but it doth not follow from thence, that it was the deed of the testator, and by consequence the defendant shall not be bound by a covenant relative to such deed.

If it should be objected, that the defendant in this case is estopped by his own deed (made between him and *Atkinson*) to say that the original deed is not the deed of *Atkinson*, because that very original deed is recited in his own deed; the answer is, that this general estoppel doth not bar him from saying, that by the first lease there is no rent reserved, or to be paid by *Atkinson*; for the defendant is

Term. S. Hill. 8 Georgii, 1721.

to perform no more than those covenants which were to be performed by *Atkinson*, and the plaintiff must shew what those covenants are before she can be entitled to this action.

Econtra.

On the other side it was argued for her, that by her declaration she hath set forth, that *per indenturam factam inter partes prædictæ Atkinson* did covenant, &c. Now these words imply, that the indenture was executed by him on his part; and therefore she need not set forth all the circumstances of * signing, sealing and delivering, because her alledging that it was made *inter partes prædictas* implies all the rest.

* P. 34.

4 Leon. 173.
Lutw. 333.

So where the plaintiff declared, that the testator *devisavit*, or that the feoffor *feoffavit*, &c. these words imply all other requisites either to a will or a feoffment; and if so, then *facta* in this case implies all requisites to the making an indenture, and *convenit* all requisites to the making a covenant.

Besides, the original indenture being recited in the other, in which the defendant covenanted to perform all the covenants therein, which on *Atkinson's* part were to be paid, done or performed; he is now barred to say there are no such covenants in the original lease, because he hath allowed it to be an indenture, and with such covenants.

Curia.

The substance of the objection is, that the plaintiff hath not set forth in her declaration, that the original indenture was signed and sealed, by *Atkinson on his part*, or that it was his deed; for if it was not, then the defendant is not bound to perform the covenants therein contained; but the plaintiff hath alledged, that it was an indenture *facta inter partes prædictas*, which implies that both *Snell* the original lessor, and *Atkinson* likewise, signed the deed, and so it became the deed of both parties, for where an indenture is made between two parties, that must be implied, and the other circumstances of sealing and delivering it as his deed, need not be set forth.

Moor 23.
Poph. 115.
Roll. Abr.
872.

And as to the *estoppel*, it is very full against the defendant, for he hath covenanted in the second lease to perform all the covenants in the original lease, which on *Atkinson's* part were to be paid, done or performed, by which he is now estopped to say, that there are no such covenants in the original lease.

So the judgment was affirmed.

The King *versus* The Mayor and Common Council of Bedford.

Election of a
burgess not
qualified set
aside.

THERE being a rule of court made against the *Mayor and Common Council-men of Bedford*, to shew cause why an information should not be filed against them, for an undue election of a burgess of the said borough; the case appeared to be thus:

Term. S. Hill. 8 Georgii, 1721.

* ¶. The town of *Bedford* is a borough by prescription, and time * P. 35.
out of mind, on the *Monday* next after *Bartholomew* day had put up
26 *burgesses*, in nomination out of which they chose 13 common
council-men, who, when chosen, had votes in electing a mayor and
other officers in the said borough; but at the last election, on
Monday after *Bartholomew* day, they put one *Benson* in nomination
with 25 more, who were *burgesses*, but *Benson* was not, he being
only a freeman of the said borough; and he was chosen by the
majority of the other 25 *burgesses*, to be one of the 13 common
council-men.

Afterwards, the mayor finding that *Benson* was not qualified to
be one of the 26 *burgesses*, for the reason before mentioned, pro-
ceeded to a new election, and then they chose one *Devereux* to be
a *burgess* in the room of *Benson*; and now *Hughes*, who was one of
the other 25 *burgesses*, and put in nomination as aforesaid, and
who was duly qualified, and had most votes to be a common
council-man next to the said *Benson*, prosecuted an information
against the mayor and the 12 common council-men, as not being
chosen by 26 qualified *burgesses*; for that *Benson*, one of the 26,
was a freeman and no *burgess*, and therefore the whole election
void, as not warranted by the custom of the borough.

But the counsel for them insisted, that the rule might be dis-
charged; for when an election is made by several persons, whereof
some are qualified to chuse, and some not, it is good as to the per-
sons qualified; for if it should be otherwise, and the election wholly
void, and that they cannot re-elect, there would be an end of this
borough by prescription, for then they can neither have *burgesses*
nor common council-men, who are to name the bailiffs, and who
have votes at the election of a mayor.

Therefore to avoid this inconvenience, if one unqualified person
is chosen, they may elect another who is qualified, as soon as they
understand he is unqualified; and this hath been the constant course
in this borough.

But this was denied by the counsel for the prosecutor; for they
insisted, that where an election is made by one or more persons
unqualified, if it is void as to the person elected, yet he who hath
most votes next to the unqualified person elected, shall be deemed
duly chosen.

It is true, where persons apparently unqualified are nominated, or
put up for candidates, in such case an election made by or out of
such persons, is intirely void, because it is an undue election, and
shall not stand for any part, especially * when by the custom of the * P. 36.
place such a determinate number of qualified persons are to chuse.

Now in this case, one of the persons nominated to be a *burgess*,
being only a freeman, and no *burgess*, and the choice of common
council-men being to be made on a certain day, and by a particular
number of *burgesses*, if it is not made on that day, nor by that
number,

Term. S. Hill. 8 Georgii, 1721.

number, the whole election is void, and not as to the unqualified person alone; for if he had not been put in nomination as a burges, he might have voted as a freeman, the benefit whereof was by this means lost, both as to himself and his friends.

It is true, in some cases the borough might proceed to a new election; as where the person chosen did not receive the sacrament within a year, &c. or where he had not taken the oaths, &c. because these are disabilities which arise after the election, and might not be known before; but where the disability is apparent before the election, as it was in the principal case, then it is void from the very beginning.

Curia.

The court declared, that what was insisted on by this motion for the prosecutor would introduce a great inconveniency; for if this should be adjudged a void election as to the whole, then the borough would be destroyed, for there cannot be any other mayor, or any thing done by common council-men;

Therefore if some unqualified (as *Benson* was) are put in nomination with those who are qualified, as the other 25 were, and the unqualified person is chosen (as *Benson* likewise was) it avoids the election as to him only, and not to the other 12 common council-men who were duly chosen and qualified; and where there is no fraud, but a plain mistake, the re-election of a qualified person shall be good.

This was the opinion of the Chief Justice and two other Judges, but the fourth differed in opinion, for it was not clear to him how 13 common council-men, who by the custom of the place were to be chosen out of 26 qualified burgesses, could be lawfully chosen out of 25, for they might as well be chosen out of any other number, if once the custom is broken.

However, he was of opinion, that *Hughes*, who had the most votes of the 25 burgesses duly qualified, next to *Benson* who was not qualified, was duly chosen; therefore, that the plaintiff complaining ought not to be hindered to try his right upon this information.

* P. 37.

* This being upon the first motion, and the court being not all of one opinion, the rule was enlarged as to the person re-elected, and discharged as to the rest.

And afterwards, on another day, and upon another motion to set aside the rule as to the person re-elected, the question was, If one who is unqualified is chosen by a majority of those who are qualified, and his election is made void, because he is unqualified; then whether a person who is qualified, and hath the majority of votes next to him who is not qualified, shall be adjudged duly chosen, or whether they must proceed to a new election.

And it was insisted that *Hughes*, who was qualified, and who had the most votes next to *Benson*, who was not, but yet was chosen, shall be deemed to be a duly elected burges, and the new election of *Deveureux* shall be void and set aside.

It

Term. S. Hill. 8 Georgii, 1721.

It is no excuse to say, that they did not know *Benson* was not qualified at the time he was chosen burghess, because it was in their power to be duly informed of the truth, for they had all the borough-books in their custody; and ignorance can be no excuse where they had all the means of knowing the truth amongst themselves.

Therefore all the votes given to *Benson* were thrown away, and he who had most votes next him is duly elected, and the borough ought not to have proceeded to a new election.

But the court held the new election to be good, as well for the mistake in not knowing *Benson* was no burghess, but a freeman at the time of his election to be a common council-man, as for avoiding an inconveniency, which otherwise would be incurable; so the election of *Devereux* was held good, and the rule discharged.

Curia.

* D E

* P. 38.

Term. Paschæ,

Anno 8 Georgii, 1722.

The King *versus* Inhabitants of Brickhill.

TWO justices of the peace made an order to remove one *Green*, and his wife and seven children, from the parish of *Horewood* to the parish of *Brickhill*, which order was confirmed upon an appeal to the sessions; and both the said orders being removed by *certiorari* into *B. R.* the case appeared to be thus:

J. This *Green* being a poor man, lived last at *Harwood*, at a place called *Roscoe's tenement*, and paid taxes there by the name of the occupier of *Roscoes*, and for that reason he and his wife and children were sent thither; and now it was moved to quash these orders, because this man ought to be *personally charged to pay taxes*, otherwise he gains no settlement by paying them as occupant of a tenement, tho' he was likewise charged as *farmer* thereof at that time; for that word *farmer* doth not prove him to be occupant, because he may let the tenement over to another.

Payment of taxes, tho' not charged personally, but only by the name of occupier of a tenement, makes a settlement.

VOL. VIII.

L

But

Term. Pasch. 8 Georgii, 1722.

But on the other side it was insisted, that *paying taxes* by the name of occupant of *Roscoe's tenement*, and naming him farmer of the same at that time, is a sufficient designation of the person to gain a settlement there; and the court being of that opinion, these orders were quashed.

* P. 39. * The King *versus* Inhabitants of Rufford and Dunnington in com' Nottingham.

The statute for relief of the poor extends to extraparochial places.
Fortesc. Rep. 321.
Sira. 512.

THIS was a *mandamus* to the justices of the peace, &c. to appoint overseers of the poor in the town of *Rufford*, who return that *Rufford* is an extraparochial place; and therefore are not to provide for their poor.

It was objected against this return, that admitting it was true, yet the justices are obliged by the statute 43 *Eliz. cap. 2.* to appoint overseers of the poor even in extraparochial places, because in the enacting part of the statute, the words are general, and extend to all places, (*viz.*) *That the churchwardens of every parish, and two or more householders there to be nominated yearly in Easter week, or within one month after, under the hands and seals of the justice of the peace, are to be called overseers of the poor, &c.*

Econtra.

On the other side it was said, that the question in this case was, whether *extraparochial places* are within this act; for as to the poor in general, the common law leaves them to their own industry, or to the charity of their neighbours.

And it was argued, that *extraparochial places* are not within that statute.

That the best expositors of acts of parliament are the acts themselves; now this act says, that the overseers of the poor must meet monthly in the *parish church or chapel*, which is a certain indication, that an *extraparochial place* was not comprehended by the act, because it is impossible for them to meet in a church or chapel where there is none; and there is a penalty of 20 s. inflicted by the statute, for not meeting in such place.

" That the justices have no power to appoint overseers, for no
" statutes that have been made for provision for the poor extend to
" extraparochial places; 43 *El. c. 2.* only mentions parishes, and
" seems to conclude extraparochial places, by making a particular
" provision (*sect. 18.*) for the island of *Fowlness* in *Kent*, being no
" parish. And 13 & 14 *Car. 2. c. 12. sect. 21.* enacts, that several
" towns and vills in particular counties shall be provided for and
" managed as parishes are directed to be by 43 *El.* by chusing over-
" seers, &c.

" 1 *Jac. 2. c. 17. sect. 2.* only uses the word *parish*.

" And 3 & 4 *W. & M. c. 11. sect. 2.* uses the word *parish* or
" town.

Term. Pasch. 8 Georgii, 1722.

“ None of which statutes extending by express words to any extraparochial places, will not be enlarged by construction of law :
“ for privileges of extraparochial places are annexed to gentlemens
“ estates, of which they ought not to be deprived by any implication or construction of law, but by plain, express and certain
“ words.

If it should be objected, that it may be a great hardship to those who should have a settlement in such places, if they were not within this statute, for then the poor could have no relief; the answer is, that it cannot be any hardship, because they may remove to the place where their parents were settled, and there would be no hardship to any but only to bastards born in such places.

The court was of opinion, that *extraparochial places* are within Curia. the words of the statute; for the justices of the peace by the general words have power to name overseers in all parishes, which must extend as well to extraparochial places, as to all parishes in general; and no subsequent words shall controul the general words in the enacting part; and certainly all the poor acts should be construed to extend * to such places, as well as to other parishes, when they are within the same mischief, and shall be subject to the controul of the justices of the peace; and the penalty for not meeting in the church shall never be inflicted on the overseers of the poor, because * the inhabitants of *extraparochial places* have no church to meet in; most of the *forests* in *England* are extraparochial, and so is *Christ-Church in Oxford*, but they ought to maintain their own poor.

Jones 165.
Palm. 485.
Cro. Car. 498.
The King
vers. Althoe,
S. P. post.
144.
* P. 40.

“ That this is a villa consisting of several inhabitants: and so is
“ within the provision of *stat. 13 & 14 Car. 2. c. 12.* for a villa in
“ a county, *not therein particularly mentioned*, will be within the remedy thereby provided; for all cases within the reason are within the remedy of the law. There is no doubt but justices have the same power to appoint overseers in towns and vills extraparochial, as in parishes: and this hath been settled. The word *parish* is not in the body of *stat. 43 El.* but only in the preamble.
“ *W. Jones 163.* Let there be a peremptory *mandamus*, which afterwards issued, bearing *teste 26 Apr. 8 Geo. 1.*

Extract from the writ.

“ Cum ostensum sit nobis ex gravi querelâ diversorum inhabitantium parochiæ de *Donington* in com. nostro *Lincoln*, quod sunt
“ diversi patres familias Anglicè *householders* & firmarii inhabitantes
“ & residentes infra villam nostram de *Rufford* in com. nostro *Not.*
“ prædicto substantiales & idonei Anglicè *able* ad equaliter contribuand. inter se pro & erga manutentionem & relevamen omnium
“ pauperum ejusdem villæ. Cumque nulli sint guardian. Ecclesiæ
“ vel supervisor. Pauperum villæ de *Rufford* prædictæ per vos seu
“ aliquos vestrum adhuc nominat. & appunctuat. infra eandem villam
“ lam

Term. Pasch. 8 Georgii, 1722.

“ lam ad faciend. aliquam equalem ratam five assessementum vel
 “ aliquas equales ratas five assessementa prout eis videbitur fore
 “ necessar. super omnes & singulos patres familias et firmarios præ-
 “ dict. inhabitant. & resident. infra vil. prædict. pro & erga manu-
 “ tention. & relevamen pauperum villæ illius ad damnum non
 “ modicum & gravamen prædict. inhabitant. paroch. de D. in
 “ com. nostro L. prædict. & pauperum dictæ villæ de R. in com.
 “ nostro Nott. ac in magnam indigentiam & oppressionem paupe-
 “ rum ejusdem villæ Nos igitur, &c. Teste Johanne Pratt milite
 “ apud Westm. nono die Junii anno regni nostri (Geo. 1.) septimo.

Return.

“ Quod villa de Rufford in brevi inframentionat. vel alicujus inde
 “ parcell. non existit nec tempore emanationis brevis prædict. vel
 “ unquam postea fuit pars parochiæ de Donington in brevi prædict.
 “ mentionat. vel alicujus aliæ parochiæ, vel infra parochiam de
 “ Donington præd. vel aliquam al. parochiam, sed villa de Rufford
 “ præd. est, & a tempore cujus contrar. Memoria homin. non ex-
 “ istit fuit locus extraparchialis absq; aliquâ ecclesiâ seu capella
 “ parochian. seu al. ritibus parochial. villæ præd. seu inhabi-
 “ tantibus villæ præd. spectant. five pertinent. Quodq; per totum
 “ tempus præd. nunquam fuer. aliqui supervisors pauperum vel
 “ aliqui al. officiar. parochial. ejusdem villæ de Rufford. Et eâ de
 “ causâ non nominavimus seu appunctuavimus nec nominare seu
 “ appunctuare possumus five debemus aliquas personas fore super-
 “ visor. pauperum ejusdem villæ de Rufford.

* See the first
argument of
this case in
Stra. 569.

* Lock versus Wright.

Mutual cove-
nants, and of
a condition
precedent.
Stra. 569.

I N debt upon certain articles dated 16 Sept. 1720. for debt on
bond for not performing covenants on a South-Sea contract, the
case was:

¶ The plaintiff Lock by a deed-poll covenanted to assign 500 l.
South-Sea stock, or credit in the fourth subscription, to the defen-
dant as soon as the receipts should be delivered out; and the defen-
dant covenanted in consideration thereof to accept the receipts as
soon as the same should be delivered out, and to pay 950 l. to the
plaintiff on the 16th of November following, for the said 500 l.
credit.

† 7 Geo. II. 2.

(Afterwards by an act of parliament, the company were pro-
hibited to give any receipts for so long time); and now in an action
of debt upon covenant brought by the plaintiff, he declared, that
the defendant, pro consideratione of the said stock sold to him, co-
venanted to pay 950 l. to the plaintiff at such a time, and assigned
the breach in non-payment of the money at the time, (viz.) on the
said 16th day of November, secundum formam articulorum, and
therefore demanded the penalty.

Term. Pasch. 8 Georgii, 1722.

And upon a demurrer to the declaration, for that the plaintiff had not set forth, he did deliver the receipts, or aver a tender thereof; it was argued for the defendant, that this declaration was ill, because the plaintiff had not alledged the performance of the covenants on his part, which he (a) ought to have done to entitle him to this action, it being in the nature of a *condition* (b) *precedent*, and not of *mutual covenants*; to prove which the authorities in the margin were (c) cited.

(a) 7 Co. Rep. 9. Lev. Rep 87. (b) Hob. 41. Saund. 520. Dy. 76. Lutw. 490.
(c) Dyer 76. Plowd. Com. 202, 482, 483. 7 Rep. 38. Sand. 320. Vent. 147, 371. 3 Mod. 39. Salk. 172. Com. Rep. 98. pl. 67. Ld. Raym. 235, 662. 12 Mod. 455.

On the other side the counsel for the plaintiff argued, that this declaration was good, because the defendant was to pay the money *on a certain day*; but there was no indefinite time for the delivery of the stock; for that was to be delivered when the books of the company were opened; therefore if the plaintiff was hindered to deliver the stock before the day appointed for the payment of the money, yet the defendant ought to pay it on the very day he had covenanted so to do; for this was a *contract executed*, * *and not executory*; and from the very time of the agreement the defendant had credit for the stock; it is true, he had no remedy at law to recover it; but he had a proper remedy in equity, and he could have no other, *if he had the receipts*, for these are only an evidence *that he had so much stock in the company*.

Econtra.

* P. 41.

Besides, this is an action of covenant upon a specialty, in which it is not requisite to lay a consideration to entitle the plaintiff to the action; *therefore though he alledged*, that he did covenant to assign the stock, &c. and that the defendant *pro consideratione inde* did covenant to pay the money, this doth not destroy the specialty; for he cannot give such consideration in evidence, at or before the day of payment of the money, being tied up by an act of parliament, to which every man is virtually a party; and the covenant on the defendant's part being to accept the receipts whenever the company would give them, and to pay the money on a certain day, he ought therefore to pay it on that day, and not to wait the time of the delivery of the receipts, which by the original agreement was indefinite.

The court upon the first argument of this case was of opinion, that since it was agreed by the counsel for the plaintiff, that the defendant had no remedy for this stock but in a court of equity, it would scarce be allowed, that an equitable interest will be a good consideration to support an action at law.

Curia.

That the case which comes nearest to the principal case in sense happened in the time of the *Chief Justice Holt*, which was thus, (*viz.*) A man hired another for a year; it was agreed on all sides, that the person thus hired could have no action for his wages till the year was expired; but if the master had covenanted to pay it on a

See 3 Vin. Abr. 8, 9.

Term. Pasch. 8 Georgii, 1722.

certain day within the year, in such case an action would lie before the year was ended; but the principal case goes farther, for there the consideration was merely an equitable interest.

(a) 1723. an.
9 Geo.
Stra. 571.

Afterwards in *Trinity* term (a) following, judgment was given for the defendant, because this deed of covenants being only a deed-poll, it is for that reason the deed of the defendant only; and therefore the covenants cannot be mutual; and it would be very hard, that the plaintiff should maintain this action for the money, before he transfers or tenders to transfer the stock, when the defendant hath no remedy to recover it at law, but only a right to have it decreed to him in equity.

* P. 42.

By Pratt Ch.
Just.
Stra. 571.

* In all executory agreements, (and this is one) where one thing is to be performed *pro* or in consideration of the performance of something on the other part, the word *pro* amounts to a condition precedent; so that the plaintiff cannot sue without averring a performance of the condition; where *pro* denotes the consideration, it is a condition precedent, *pro* is a proper word to create a condition. *Co. Lit.* 204. a. 7 *Rep.* 10. Grant of an annuity *pro una acra terræ*, *pro* sheweth the cause of the grant, and therefore amounteth to a condition, for if the acre be evicted, the annuity ceases; but a feoffment of land *pro consilio impenso*, &c. if the feoffee denies counsel, yet the feoffor cannot re-enter, for the sale of the land is executed.

Stra. 571.

As *pro* is a proper word of condition, so it may be construed either precedent or subsequent, as best answers the intent of the parties.

Stra. 572.

If I sell an horse for 10 *l.* the vendee cannot sue for the horse, without averring payment, or tender of the money.

Stra. 572.

The several distinctions in the case of *Thorpe v. Thorpe* are very nice and reasonable.

* 1 Salk. 112.

pl. 1.

The case in Salk. is infinitely stronger according to the MS. Not so strong according to Stra. 572.

So is the case of * *Colonel* versus *Biggs*, which was thus, (*viz.*) An agreement was made, that the defendant should pay so much money within six months, the plaintiff transferring his stock, which he agreed to do, the defendant paying the money agreed on; it was adjudged, that if either party sue upon this agreement, the one must aver and prove a transfer of the stock, or a tender to be transferred, and the other must aver and prove the payment of the money, or a tender of payment, because the transferring in the first part of the agreement is a *condition precedent*; and tho' these are mutual promises, yet where one thing to be done, is the consideration for doing the other, the performance of that thing must be averred; it is true, the book goes farther, (*viz.*) unless there is a certain day appointed for the performance, which makes it exactly like the principal case.

Salk. 172.

Lutw. 245.

So where in an action on the case the plaintiff declared, that there being a discourse of a mortgage, &c. the plaintiff did agree to release the equity of redemption; and in consideration thereof, the defendant

Term. Pasch. 8 Georgii, 1722.

defendant did agree to pay 7*l.* then there were mutual promises laid, and the plaintiff averred the performance on his part, and that the defendant had not paid the 7*l.* It was adjudged, that the releasing the equity of redemption was part of the agreement *which the plaintiff ought to execute, for it was upon* that consideration, that the defendant was to pay the money; therefore the release was to precede, and till that was executed, the plaintiff had no cause of action.

Now in the principal case, that this was a *deed-poll* they grounded their opinion upon the case of *† Pordage and Cole*, which was thus, *† Sand. 319. 2 Keb. Rep. 542, 543. pl. 5. T. Raym. 188. Sid. 423. Vent. 147. Lev. 274. this case is in point. See Stra. 572. Ld. Raym. 665. * P. 43.* There was an agreement in writing between the parties, that the one should pay 500*l.* to the other for all his lands, in witness, &c. This agreement was mutually executed, &c. and afterwards the plaintiff brought an action of debt for the 500*l.* without averring in his declaration, that he had conveyed the lands, or *tendered* a conveyance thereof: Adjudged that after the day was past, on which by the agreement the lands were to be conveyed, the action was well brought for the money, because this was a * mutual agreement, upon which either party hath a mutual remedy; but it is otherwise where the preposition *pro* makes it a *condition precedent*; and the court held that it would have been otherwise in the case last mentioned, if it had been the deed of one of the parties.

“ The true distinction is between a deed poll and an indenture
“ executed by both parties; if one agrees to do an act, and the
“ other agrees to pay *pro* the act; the first person cannot sue for the
“ money without averring performance of the act; *pro* does not
“ make a condition precedent, where the deed shews the intent of
“ the parties to be contrary: as if the money be agreed to be paid
“ before the act can be done.

“ In this case the defendant hath no remedy to compel a transfer
“ of the stock, if he pays the money. *Stra. 571.*

“ Wherefore judgment was given for the defendant.

Term. Pasch. * 8 Georgii, 1722.

Lawrence *versus* Jacob, *Thursd. 26 Apr.*

* “ L. C. B.
Comyn ob-
serves, that
on this case
being relied

on in *Skip v. Hook*, in the *Common Pleas*, that court declared it misreported, and judge Fortescue produced the paper book, and said it was Pasch. 8 Geo. Com. Rep. 563. pl. 240.”

UPON a writ of error in *B. R.* upon a judgment in the *Com- mon Pleas*, the case was: The plaintiff who was “ executor of a second indorsee of a promissory note,” brought an action “ against the indorser” for default of payment by the indorser, and after “ a demurrer to the declaration,” and judgment for the plaintiff in the *Common Pleas*, and a writ of error in *B. R.* the error assigned was, that the plaintiff in his declaration did not set forth, that the drawer had notice of the “ indorsement, nor any demand or default alledged in
“ In an action on a promissory note against the drawer, the plaintiff need not alledge notice to the defendant of the indorsement.”

Term. Pasch. 8 Georgii, 1722.

Com. Rep.
563. pl. 240.
Pract. Reg.
C. P. 358.

in the drawer ;" *sed non allocatur*, it being the constant form, and matter of evidence ; judgment was affirmed, on the authority of the case, and on the reason of the thing ; for the defendant by his demurrer admits that in consideration of the premisses, (*viz.*) the defendant's making the indorsable note, and the indorsing it to the plaintiff, the defendant assumed to pay the money, according to the tenor of the note.

Curwin or Colvin *versus* Fletcher.

Recusancy
pleaded in
disability.
Stra. 520.
* Co. Lit. 128.
a. b. is an
outlawry.
Mod. Rep. 14.
Lev. 89. to
the jurisdic-
tion.
3 Lev. 343.
plea of privi-
lege.
Vent. 76, 135.
Yelv. 112. in
abatement of
bill.

Co. Lit. 128.
3 Lev. 334.
Lutw. 1100.
Litt. Rep.
201.
(a) N. B. The
plea begins,
" Quod præ-
dictus (the
defendant) ad
billam ipsius
querentis re-
spondere non
debet."

DEBT upon bond against the defendant, who after a general imparlance, pleaded the statute of 1 Geo. st. 2. c. 13. sect. 23. and *recusancy* in disability of the person of the plaintiff, and therefore prayed *quod loquela prædicta remaneat inde sine die*; and upon a demurrer to this plea it was objected, that it ought not to be allowed after an imparlance; because pleas in disability are dilatory, and therefore should be pleaded at first; and to prove this, the cases in the * margin were cited.

To which it was answered, that the reason of those cases doth not come up to the present case, because those were all *pleas in abatement* of the writ; and in such case, if it is abated, the plaintiff may have a new writ: but this is in disability of having any writ at all, during his recusancy; and therefore

2d objection was, that this (a) plea is ill, for that it concluded *prout patet de recordo*, for the conviction of recusancy being at the sessions, which is a record of another court, it should be immediately pleaded with a *profert hic in curia sub pede sigilli*. " Because the plea is but dilatory, unless the record be in the same court, for the defendant shall not have a day allowed him to bring in the record. Lutw. 17, 18. 2 Lutw. 1100. Co. Lit. 128. a. b. Lit. Ten. sect. 211. Bro. Abr. tit. Record, pl. 36. 3 Lev. Rep. 334. Com. Rep. 307. pl. 158. where a plea of a recusant convict was adjudged ill for this exception.

" In answer to this objection it will be said, that the record of a conviction is *certified* into this court: and being of record here need not be pleaded *sub pede sigilli*.

But the words of stat. 1 Geo. " That if the person, to whom the oath shall be so tendred, shall neglect or refuse to take the same, such justices, &c. shall certify the refusal thereof to the next quarter-sessions of the county, &c. and the said refusal shall be recorded *amongst the rolls of that sessions*, and shall be from thence certified by the clerk of the peace, &c. into the court of Chancery or King's Bench, &c. there to be recorded, &c. and every such person, &c. shall from the time of his refusal be adjudged a popish recusant convict," so that the *record remains* at the sessions, and the refusal only is certified here.

Term. Pasch. 8 Georgii, 1722.

Besides, this certificate being made by the clerk of the peace, is
+ traversable, for he is no more than a ministerial officer, and + Leon. 205,
therefore it is not a record to conclude the judgment of this court. 206.

“ And if the facts contained in the certificate may be denied, it is Moor 541.
“ but reasonable to plead the certificate *sub pede sigilli*. pl. 714.

* “ To which it was answered, that a record in the same court * P. 44.
“ where it is pleaded, need not be shewn *sub pede sigilli*, Co. Lit.
“ 128. b. which I admit to be necessary, where the record remains
“ in another court; the *stat. 1 Geo.* creates the disability, from the
“ refusal of the oaths, and not from the time of the refusal re-
“ corded; the record is only evidence of the refusal, it does not
“ create the disability; so that the present case is very different from
“ the cases quoted; for there the record is the disability, as the
“ judgment in the case of an outlawry, which is the record; if the
“ certificate by the clerk of the peace into this court of the refusal,
“ which was recorded at the sessions, be traversable, so that the facts
“ therein contained lie open to be examined, the consequence will
“ be that there is no need to plead the record *sub pede sigilli*, since
“ the certificate is no record, only an evidence; pleading the record
“ *sub pede sigilli*, when the record does not create the disability,
“ would vitiate the plea; when a defendant pleads *another action*
“ *depending*, he never pleads the record *sub pede sigilli*, because
“ other facts are necessary to be proved, as that the actions were
“ brought for one and the same cause.

“ If the record makes the disability, yet it does not remain in
“ the sessions, but is transmitted into this court as effectually, as if
“ it had been removed by *certiorari*, since the act supplies a *certio-*
“ *rari*.

It is true, the clerk of the peace in certifying this record, is but
a ministerial officer; but it is not a material objection for the plain-
tiff to say so, because he hath an opportunity to traverse it, and to
try the fact; but here the plaintiff by demurring to this plea hath
owned the fact, which otherwise ought to have been proved by the
record. *Lev. Rep.* 87. “ The plaintiff was to prove an arrest, and
“ because he did not produce the writ, the defendant demurred
“ upon the evidence; adjudged, that the writ ought to have been
“ produced in evidence; but the demurrer confessed the arrest, be-
“ ing a matter of fact, tho’ to be proved by a matter of record.

But this was denied by the counsel for the plaintiff, who argued, For the
that by the demurrer the fact was not confessed; for the plaintiff plaintiff.
demurred, because the defendant had not pleaded the fact, and not
to the fact pleaded.

(3.) The third objection was, that the statute 3 *Jac. cap. 4.* gives
the sessions power to make proclamation against recusants to render
themselves, &c. which if they do not, and that the default is re-
corded, that shall be taken for as sufficient a conviction as a trial by
verdict; now the defendant hath not pleaded, that any such de-

Term. Pasch. 8 Georgii, 1722.

For the de-
fendant.

fault was recorded at the sessions; therefore this being in a criminal case, wherein the utmost certainty is required, this plea cannot be good without pursuing all the circumstances required by the act.

The answer was, that the statute requires the conviction should be certified into the Exchequer with such convenient certainty, that the court may award process thereon; and the defendant hath pleaded, that it was certified there, which could not have been done unless the default had been recorded at the sessions.

(4.) Another objection was, that this plea was wrong concluded, for it was, that the defendant *eat inde sine die*, when it should be *ideo loquela præd. remaneat sine die quousq;* "for the disability is no "absolute bar, but temporary only till conformity; as an outlawry "pleaded in disability of the person ought to conclude *si respon-* " *deri debet*: for if after such plea the plaintiff obtaineth his "charter of pardon, or reverseth the outlawry, the defendant shall "answer, for then the plaintiff is restored to the law; for the dis- "ability does not abate the writ, only disableth the plaintiff till a "pardon or reversal of the outlawry. *Co. Lit. 128. b. 5 Rep. 109.* "The same case of an excommunication, which does not abate "the writ, only disables the plaintiff from proceeding till he pur- "chases letters of absolution. *Co. Lit. 134. b.*

"To which it was answered, that the commencement and con- "clusion of the plea are both proper for a plea in abatement; tho' " *quousque* is omitted, yet the plea is good, for in many precedents "of the like nature, there are the same omissions; *unde petit judi-* " *cium si responderi debet*, is the legal conclusion of a plea in dis- "ability of the person, and would be sufficient without any fur- "ther prayer. *Co. Lit. 128. a.* When a plea in abatement begins "properly as such, it will be good tho' the defendant concludes it "with praying an improper judgment, for the court is to give "a proper judgment. *Lev. Rep. 222. 2 Lev. Rep. . Rast.* " *Ent. 333, 334. (nov. impres.) Lev. Entr. 11. Thomps. Entr.* " *191. Brownl. Ent. Rediviv. 466, 467. Bilson v. Cross, Hil.* " *2 An. C. B.* Replevin in C. B. for taking a mare, the de- "fendant pleaded first *in another place*, and concluded with a " *petit judicium & retorn. Equæ præfat.* the plaintiff took issue "on the taking *in another place*, the defendant demurred, and con- "cluded *unde ut prius petit judicium, et quod narratio cassetur*; "judgment in C. B. for the plaintiff. On a writ of error it was "insisted, that there was a discontinuance, the plea being in bar, "and the demurrer in abatement; but the judgment was affirmed, "the demurrer being in bar, for *unde ut prius petit judicium* was "sufficient, and the rest which followed was rejected as surplusage; "judgment final was given in C. B. the plea concluding in bar, "tho' the matter pleaded was matter of abatement.

"*Eyre Just. Quod narratio cassetur* is a conclusion in bar, the "precedent in *Rast. Ent. 319. b.* is a plea of excommunication, and "concludes, *quod loquela remaneat quousque.*

Term. Pasch. 8 Georgii, 1722.

(5.) The fifth objection to this plea was, that the defendant did not set forth, that the plaintiff had not taken the oaths since the King's accession to the crown; for if in fact he had taken them since that time, then the statute doth not extend to him, therefore this matter ought to have been specially set forth like a *precedent condition*, by him who is to have the benefit of it, (*viz.*) that the plaintiff was a person on whom the act attaches.

* For by the statute 1 Georgii it is enacted, that all persons * P. 45. who shall take and subscribe the oaths in the manner appointed by Stat. 1 Geo. that act, are indemnified from any penalties and incapacities, &c. c. 13. incurred by any former neglect.

" This may be compared to the plea of a pardon, which must
" aver that the defendant is a person not (a) excepted in the act; (a) *Fost. Cr.*
" a clause coming by way of proviso or exception (as this does) is *Law 87. post*
" the same in respect of pleading. *59.*

The answer was, that by the next clause in that statute it appears, that this doth not extend to any person, other than such who entitle themselves to any offices or places of trust, for those only are indemnified from any incapacity incurred, and may bring any action if they have taken the oaths since the King's accession to the crown.

" Besides, the plaintiff ought to shew that he was excepted by
" virtue of the proviso, the defendant having sworn that he is in-
" cluded within the purview of the act. *Sed adjournatur.* See 381.

The King *versus* Selfe.

THE defendant was indicted at the assises for *forging the stamps*, and appeared there upon his recognisance to answer the said indictment, and pleaded Not guilty, and upon his trial he was convicted; but upon a motion in arrest of judgment it was set aside; afterwards he exhibited a bill in Chancery against the prosecutor of the indictment, who pleaded this conviction of forgery in bar to the said bill; and now the plaintiff in Chancery moved the court of B.R. that the record might be made up with the arrest of the judgment, for that by a mistake of the clerk of the assise that was not recorded, nor did there any notes thereof appear in his books, but only that he was bound over by recognisance to appear at the assises, and that he did accordingly appear and saved his recognisance; all which matter being evident to the court by the records of the assises; but yet they would make no rule for the record to be made up with the arrest of judgment, because a precedent of this nature might be of dangerous consequence, and therefore desired that the cause might be put into the paper, and spoke to again, that it might be judicially determined.

A rule was denied to make up a record with the arrest of judgment, &c.

The

Term. Pasch. 8 Georgii, 1722.

The King *versus* Okey.

Information
against a ju-
stice of peace
for sending
one to the
house of cor-
rection with-
out cause.

* P. 46.

Curia.

UPON a motion to file an information against the defendant (who was a justice of the peace) for sending the prosecutor to the house of correction without a sufficient cause; the rule was, that he should shew cause on such a day, why the information should not be filed; and now he shewed this for cause, (*viz.*) that the prosecutor was a servant to *L. R.* who complained to the defendant, that his * said servant was sawcy, and gave his (the master's) horses too much corn.

The court held this was not a sufficient cause to send a man to the house of correction; so leave was given by the court to file an information against the justice of the peace.

D E

Term. Sanct. Trin.

Anno 8 Georgii, 1722.

Mayhoe *versus* Archer.

A farmer no
trader within
the statute of
bankrupts.
Stra. 513.

IN a special verdict, the case was thus, (*viz.*) The jury found that *Richard Baxter* rented a farm, for which he paid 300 *l.* *per annum*, and that he planted potatoes on part of the lands which he farmed, and that he bought great quantities of potatoes to utter and sell again for profit, and that for several years past he dealt with several persons in potatoes at several times and places, and had employed warehouses, where he put in potatoes, and had served several markets therewith, and had sold *great quantities* thereof for profit, and for his living, &c.

Upon this special verdict there were two points raised:

(1.) If the jury have found enough to make *Baxter* a trader within any of the statutes made against *bankrupts*.

Term. S. Trin. 8 Georgii, 1722.

(2.) Whether a *farmer* who sells potatoes, tho' he buys several other great quantities thereof, and gets his living thereby, is within any of the said acts.

* As to the first point it was argued, that the jury had found * P. 47. enough to make *Baxter* a *trader* within the statutes of bankruptcy; for tho' farmers or innkeepers, *quatenus* such, are not within those statutes, yet as traders they are, and here tho' the jury have found that *Baxter* was a farmer, yet they likewise find that he was a trader in *potatoes* which he bought and sold; and there is a case adjudged in this very point, (*viz.*) * If a farmer buys and sells *butter* * Cro. Car. and *cheese*, he shall be accounted a *trader*; and that such a trader 549. failing to pay his debts, is a *bankrupt*, and by this means he is a criminal; and therefore the law shall be construed against him very strictly in favour of his creditors.

If a man hath several trades, whereof one is within, and another not within the statutes; yet he shall be accounted a trader so as to make him a bankrupt, and so shall a *lawyer dealing in coals*.

And the dealing more in one commodity than in another, doth not alter the case; for no man (except the trader himself) can tell in what commodity he mostly deals; therefore that trading which is the most visible means of his livelihood is to be regarded. March 35. Vent. 166, 129. Lev. 17. Sid. 411.

Now in the principal case it is apparent, that by dealing in *potatoes* *Baxter* got credit, and probably of several persons who did not know that he rented a farm; but if he did not, yet there are sufficient words in this verdict to make him a *trader*, it being found that he sold several great quantities of *potatoes*, &c.

(2d point.) There are many great *hop-merchants* in England, who have hop-yards of their own; but yet shall be accounted traders, so as to subject them to the statutes of bankruptcy; and this trade of dealing in *potatoes*, tho' he was likewise a *farmer*, may be compared to that case where the plaintiff libelled for tithes of *faggot-wood*; and the defendant suggested for a prohibition, that no tithes ought to be paid for *oak-faggots*; the plaintiff in his prayer for a consultation may shew, that the defendant had so sorted the faggots, that it was impossible for him to take the tithes of the one without the other. Vel. 119. Poph 38. 3 Cro. 347. 566. 2 Lev. 80. Sid. 38. T. Jones 438.

It was argued on the other side, that this case, as found by this verdict, is not within the intention of any of the statutes of bankruptcy, because it is not found that *Baxter* got his livelihood by buying and selling of *potatoes*; for if he bought some, and had some of the growth of the lands which he rented, he is not a *trader* within any * of those statutes; for a farmer who bought and sold cattle was adjudged no trader, so as to make him a bankrupt; nor an innkeeper who lays in malt and corn, neither shall a farmer who deals in turnips be accounted a trader. * P. 48. Econtra.

The court being divided, no judgment was given, but two of the judges seemed to be of opinion, that where a man bought

Term. S. Trin. 8 Georgii, 1722

great quantities of *wool or hops*, tho' he hath a farm, and sheep of his own, and several hop-gardens, he shall be accounted a trader in those commodities, and so shall an innkeeper, if he turn corn-chandler.

It is true, the jury have not found that *Baxter* got the chiefest part of his livelihood by buying and selling potatoes, but it is not the quantity which is material, if it is in proportion to other goods which he buys and sells; for if a man hath an orchard, and buys several quantities of fruit of other people, tho' not so many as he hath in his own orchard; yet this shall make him a trader, and consequently subject him to the statutes of bankruptcy.

The two other Judges were of a contrary opinion, (*viz.*) That here was not enough found by this verdict to make *Baxter* a bankrupt; for a farmer is no *trader* within any of the acts before-mentioned, *quatenus* a farmer; and tho' he uses another trade, yet if that is not the principal means of his livelihood, he is not a trader within those statutes; it is true, if buying and selling in any trade is the chiefest means of his livelihood, then he is a trader within the acts of bankruptcy; but that is matter to be given in evidence, and found by the jury, which was not done in this case.

Therefore they held, that this was an insufficient verdict, because the jury did not find that *Baxter*, by buying and selling potatoes, got the chiefest part of his livelihood, or that it did exceed his farming trade, for all that the statute requires is, that *trading* should be the chief matter to make him a bankrupt.

A special verdict amended.

Afterwards in *Trinity* term the counsel for the plaintiff finding the Judges differed in opinion, they moved for a *venire facias de novo*, or that the court would give leave to mend this special verdict upon the *affidavit* of one of the witnesses at the trial, that *Baxter* bought potatoes several years, to the value of five hundred pounds *per annum*; and thereupon a rule was made for the other side to * P. 49. * shew cause why the verdict should not be amended, and the cause which they shewed was, that tho' this witness had sworn the same thing at the trial, yet it was without precedent to have a verdict (which is a record) to be amended by such an *affidavit*; for tho' it was the same which was given in evidence before, yet the jury did not believe it, or probably there might be other evidence at the trial to disprove it.

But the court was of opinion, that a special verdict might be amended by notes taken by the clerk at the trial, or on proof of the certainty of what was then given in evidence, and the same was ruled accordingly upon payment of costs.

" In *Mich.* term 9 *Geo.* after the amendment the court held him a trader, saying, there was now no difficulty; and gave judgment for the plaintiff, without argument.

Nota; This case was between two creditors of the bankrupt, for the statute 21 *Jac. cap. 19.* gives no precedency between the creditors

Term. S. Trin. 8 Georgii, 1722.

creditors of a bankrupt, though the debts are due to some upon recognisances or judgments, or other specialties, and to others upon simple contracts; for it is enacted by that statute, that in the distribution of the bankrupt's estate, no more respect shall be had to the debts upon judgments and specialties, &c. than to other debts.

* The King *versus* The Inhabitants of St. Peter in the * P. 50.
East in the city of Oxford.

TWO (a) justices removed *Mary Norris* from the parish of *St. Peter* in the *East* in the said city to the parish of *Fawley* in the said county of *Oxford*: which order was discharged by the sessions, upon appeal; it appearing (as it is stated in the order of sessions) that the said *Mary Norris* was hired at *Christ Church* in *Oxon*, an EXTRAPAROCHIAL place, on the 16th of May 1717, for one year to Mrs. *Cooke*, who then lived, and ever since hath lived with her son-in-law Doctor *Clavering*, Canon of *Christ-Church* College aforesaid, as a sojourner or boarder; and continued in her service there, till the month of ——— in the same year; when Mrs. *Cooke* went, upon a visit, to her son's Mr. *Freeman's*, in the parish of *Fawley* aforesaid, where she continued three months, upon the said visit; and her said servant *Mary Norris* was with her at the said Mr. *Freeman's*, and continued there in her service all the three months; at the end of which, the mistress returned again to *Christ-Church* aforesaid; and there the year's service expired, she having served her mistress the whole year, in pursuance of the first hiring.

A servant living with a visitor gains a settlement.

Sira. 524.

Foley 272.

Caf. of Set.

and Rem 105.

pl 139.

2 Sef. Caf.

138.

(a) The state

of this case is

taken from

Master Bur-

row's Reports,

vol. 1. fol.

312. who,

since there

had been so

much doubt

and misappre-

hension con-

cerning it, had

the curiosity

to transcribe the true case from the original record. N. B. This gentleman hath obliged the profession with two volumes of most excellent Reports in B. R. they are the best digested collection by far of any hitherto published.

“ Afterwards she being poor, and likely to become chargeable, went into the parish of *St. Peter's Oxford*; and from thence she was removed, by the order of two justices, to the parish of *Fawley*, as having gained a lawful settlement there (as they apprehended) by the three months service: and upon appeal the sessions discharged that order, being of opinion, she gained a settlement in *Christ-Church*, that being the place where the service determined.

“ Both which orders being removed into B. R. by *certiorari*, it was insisted, that the sessions order might be quashed, and the order of the two justices confirmed.

There were three questions:

“ 1st. Whether an hiring in an extraparochial place will gain a settlement? If it does, then the hiring in *Christ-Church* and ser-

“ vice

Term. S. Trin. 8 Georgii, 1722.

"vice for three months in *Fawley Court* gains a settlement in *Fawley*; a service in any parish for 40 days in pursuance of a good hiring for a year, created a settlement on *stat. 3 & 4 W. & M. c. 11. and 8 & 9 W. 3. c. 30.* which requires a service for a year, uses the words, *in any town or parish*, so that a person hired in any extraparochial place, which is neither a town or parish, is not within the words of the statutes, for it is not to be presumed that those words would have been used, unless they were to bear some signification, and be of some effect, in the construction of the statute; the intent of the statute in using those words, and thereby excluding hirings in extraparochial places might be, that if a person who is insufficient lives a servant in any parish or town, he may be removed, and thereby the parish will prevent the servant's gaining any settlement; if a contrary construction is made, a servant hired in (a) *Ireland* or *Scotland* coming over here and dwelling with his master will gain a settlement.

(a) Mr. Justice Eyre held, that if a

man was hired in *Ireland* for a year, and after came within the year, and lived in *England* the last 40 days with his master, that was sufficient to gain a settlement. *Foley* 274.

"2d Question. Whether the mistress's going on a visit into *Fawley* is such an inhabitancy as will gain a settlement for the servant, she serving there 40 days? Without doubt it would never intitle the mistress to any settlement, for the words of *stat. 13 & 14 Car. 2. c. 12.* are coming to settle; and if the law is so as to the mistress, the reason equally holds as to the servant. The case of *mulier puisne* coming to dine, &c. with bastard *eigne* was compared to this. *Co. Lit. 245. b.*

"3d Question. Whether the special order be sufficient? Not shewing that *Mary Norris* was in the parish of *St. Peter's* by intrusion; which it was insisted was necessary to give the two justices a jurisdiction of removing her.

Econtra.

(b) The able writer of the Pleas of the Crown, which book the late Mr. J. Foster much commends. See *Fost. Cr. Law* 207.

"*Hawkins* (b) serj. econtra. 1. This hiring is a good hiring within *stat. 3 & 4 W. & M. c. 11. and 8 & 9 W. 3. c. 30.* (1.) It is within the letter and words, for *Christ-Church* is said to be in *Oxford*; so that *Oxford* must be taken to be a town, and *Christ-Church* a school in *Oxford*; so that the hiring is in a town. But (2.) If *Christ-Church* is taken for an extraparochial place, yet it is within the intent and meaning of the acts; for the terms *town* or *parish*, are only put for example, *Fol. 273.* and not to exclude any other place wherein a servant should be hired; besides, these acts relating to the settlement of the poor, have always received an equitable interpretation: if a servant hired in one parish, and having served there half a year, removes with his master into another parish, and serves there the rest of the year, he will be settled in the second parish, and yet he was never hired in such second parish, which seems to be required by the express words of the act; and the reason of such construction is, because the original

Term. S. Trin. 8 Georgii, 1722.

“ original contract obliges the servant to go wherever his master
“ commands him; and he is in law hired into whatever parish he
“ goes; so the words of 3 & 4 W. & M. c. 11. are, *any unmar-*
“ *ried person having no child or children being hired for a year;* Fortesc. Rep.
“ yet a widower having a child married is within the intent of the ^{309.}
“ statute, tho’ not within the words. The same exposition hath ^{Caf. of Set.}
“ been made in the certificate act, 9 & 10 W. 3. c. 11. which has ^{and Rem. 5.}
“ expresses negative words, *That such person shall by no act whatever,* ^{pl. 7.}
“ *unless he takes a tenement of ten pounds per annum, or execute some* ^{Fol. 180.}
“ *parochial office, gain a settlement:* or a certificate person having ^{Stra. 163.}
“ a copyhold descended to her gained a settlement. ^{Caf. of Set.}
“ ^{and Rem. 90.}
“ ^{pl. 121.}
“ ^{10 Mod. 430.}

“ As to the 2d question. A servant going into a parish with his
“ mistress will gain a settlement, tho’ the mistress is only a lodger
“ or a visitor, for the servant’s settlement is independent of the
“ mistress’s, and not derivative from it, for the meritorious act
“ which gains the settlement is the service, and that is performed
“ by the servant: how far a visitor may gain a settlement for her-
“ self is not material in the present case; tho’ such person may
“ seem to be included in *stat. 13 & 14 Car. 2. c. 12.* under the word
“ *sojourner*; and by the old law a visitor was esteemed an inhabitant,
“ and obliged as such to find securities to the decennage. See
“ *Fortesc. Rep. 221. Burn’s observ. 107. Fol. 274.* But in de-
“ termining a servant’s settlement, there is no necessity to inquire
“ into the settlement of the master: for a servant living with a
“ certificate person was settled before *12 An. st. 1. c. 18.* though
“ the certificate person gained no settlement.

“ As to the 3d question. In the original order it is said, that the
“ poor person intruded into the parish; it was lately adjudged that
“ an order of removal does necessarily imply that the poor person
“ was in the parish.

“ *Endeavouring to settle* is not sufficient without saying *coming*
“ *to settle*; because the one may be done without the other.

The court held, that when a servant continues in the service of ^{Curia.}
a visitor, he gains a settlement; for he cannot be removed, unless
the parish shew that he was brought or came thither on purpose
that he might have a settlement; for the statute doth indefinitely,
and without any exception appoint, that where the service is for
forty days, it shall gain a settlement; therefore it shall have a fa-
vourable construction in behalf of the poor.

So if a woman is delivered of a bastard-child in such a parish,
the birth gains a settlement, but not if she is sent thither on purpose
for that end, or if her settlement was contested before she was de-
livered.

* Tho’ the mistress in this case was a visitor, and no lodger, that * P. 51.
doth not alter the case, because the service was intirely independent ^{Fol. 273.}
of her; and as to the objection that the statute requires, that the ^{Stra. 525.}
hiring should be in a town or parish, and that this servant was
hired neither in the one or the other, but in an extraparochial place;

Term. S. Trin. 8 Georgii, 1722.

this is of no weight, for a servant may be said to be hired in every parish where he serves, as well as a man who steals cattle in one county, and drives them into another county, may be said to steal them in either county.

The original order was confirmed; and the order of sessions quashed.

Winnington *versus* Briscoe.

An agreement impossible to be performed shall not prejudice any person.

THE plaintiff bought 1000 l. South-Sea stock of the defendant, on the 10th day of August 1720. for which he (the plaintiff) agreed to pay 11250 l. and had paid 3000 l. part of the money; and the defendant promised to give him (the plaintiff) receipts for the said 1000 l. stock, as soon as the books of the company were open; but before they were opened an act of parliament was made, prohibiting any more receipts to be given out, &c. whereupon the plaintiff brought his action against the defendant for the 3000 l. he had paid to the defendant as so much money he had received to his (the plaintiff's) use: the question was, Whether the failure to deliver the said receipts should subject the defendant to this action, or whether the defendant himself might not have an action against the now plaintiff for the remaining 8250 l.

Curia.

The court was of opinion, that the receipts being no part of the consideration, but only an evidence of the agreement between the parties, which agreement being impossible to be performed by an act of parliament intervening, shall prejudice neither party; and the subscription itself, which the defendant is still ready to give, is but an evidence likewise of the agreement; but the credit he hath is the substance.

(a) 2 Ld. Raym. 1541.

Mason *versus* Bushel or (a) Ruffel.

Where the word yeoman is a good addition to the name.

2 Inst. 668.

(b) 1 H. 5.

cap. 5.

* P. 52.

THE plaintiff brought an action against A. B. late of H. &c. yeoman; the defendant pleaded in abatement, that he was a borner, *absque hoc* that he was a yeoman; and upon demurrer to this plea it was argued, that yeoman was a good addition within the (b) statute * 1 H. 5. by which it is enacted, that in original writs where exigent shall be awarded, the addition of the defendant's condition and dwelling shall be inserted; now here there was the addition of yeoman, which the defendant must be if he is not a gentleman, and a borner may be a yeoman, (i. e.) an ordinary or common person; and if so, then the plaintiff hath election to name the defendant, either by his degree or condition, or by his mystery or trade; and this being a plea in abatement, the defendant ought to have given the plaintiff a better writ, and that directly in the same species of addition, and opposite to the addition of yeoman, which he should have pleaded.

Term. S. Trin. 8 Georgii, 1722.

The court was of opinion, that the defendant ought to have given the plaintiff a better writ in the same (a) *species of addition*, otherwise he would take away his (the plaintiff's) election of *addition* of his decree or mistery, for an *horne* and a *yeoman* are not inconsistent; therefore the plea was adjudged ill, and the defendant ruled to answer over.

(a) This was said by Eyre, but Pratt L. C. J. doubted whether it was necessary to be in the same *species*.

Phillybrown *versus* Reyland.

AN action on the case was brought by the plaintiff as a parishioner of the parish of C. against the defendant, being the clerk of the vestry there, for shutting the vestry-door, and keeping the plaintiff out of the room, so that he could not come in to vote, &c. And upon a demurrer to the declaration it was insisted for the defendant, that an action would not lie in this case, for if it should, then every parishioner who was kept out might have the like action; therefore to avoid (b) multiplicity of suits, this will not lie against the defendant, unless he had set forth some particular damage done to him; *adjournatur*.

See *post* 351.

Case, &c. for keeping the plaintiff out of the vestry-room, so that he could not be present to vote at an election for parish-officers. Stra. 624. 2 Ld. Raym. 1388. (b) 5 Rep. 72. Williams's case. Salk. 12, 15.

Sheers *versus* Lammas.

IN *replevin*, &c. the defendant avowed, setting forth, that T. S. being seised in fee of the place where, &c. made a (c) lease thereof to the plaintiff, *habendum* for 19 years from * Michaelmas, &c. rendring rent, &c. and afterwards devised the lands to the defendant and his heirs, and died; then he sets forth, that the plaintiff in *replevin* *virtute dimissionis prædictæ*. (d) *intravit* (but did not say on what day) & *fuit inde possessionatus*, and that so much rent was due on such a day, and being in arrear, he distrained, &c. and so justified the taking; and upon a demurrer to this avowry it was objected, that the entry was laid too general, for it ought to be *virtute cujus quidem dimissionis* (the plaintiff in *replevin*) *intravit on such a day*, & *fuit inde possessionatus*; because unless the particular day of his entry is set forth, he might enter before the lease commenced, and then he could be no *tenant*, but a *trespasser*; and in such case the avowry ought to have been for a *trespass*, and not for *rent*, for wherever an action of debt is brought for *rent reserved on a lease for years*, or where a justification is made for rent arrear on a lease, it must be specially shewed, that the person, from whom the rent is due, entered on the day the lease commenced.

In an avowry the particular day of entry was not set forth, yet good. P. 53. (c) It was made subsequent to the demise, and the main point upon the first argument arose upon its being so, viz. whether it was a total revocation of the devise during the lease, so as nothing should pass; or only a revocation *quoad*

the term as to the possession only, so that the reversion and rent should notwithstanding pass; and the court held the latter. (d) The lease was set forth to commence from *Mich.* and the entry to be *ad festum Sancti Michaelis virtute dimissionis intravit*; so that it appeared to be a *disseisin*.

But

Term. S. Trin. 8 Georgii, 1722.

But on the other side it was insisted, that the allegation in this avowry is sufficient to shew, that the entry was before the distress taken.

Curia.

It is true, there is no particular day set forth in this avowry, when the plaintiff entered; but yet these words, *virtute cujus quidem dimissionis intravit, & fuit inde possessionatus*, must be intended of a legal entry by virtue of the demise; but admitting that he had actually entered before the commencement of the term, yet these words, *Et fuit inde possessionatus*, shall be taken to continue the possession afterwards.

My Lord Coke, in his comment on *Littleton*, hath a parallel case, (*viz.*) If tenant for life in remainder disseise the tenant in possession, he hath gained a fee by such disseisin; but by the death of the disseisee that wrongful fee is turned into a rightful estate for life by operation of law.

See Hob. 72.

Pope ver.

Skinner.

Hob. 128.

Nisbhart ver.

Cafon.

Cro. Jac. 662.

Rutter ver.

Mills.

Cro. Jac. 684.

Brookbank

ver. Taylor.

3 Mod. 198.

* P. 54.

So in the principal case, the continuance of the possession by the plaintiff shall be intended by virtue of the lease, by which he might defend himself in an action of trespass or ejectment brought by the lessor; but the court being not clear in opinion, no judgment was given.

But the following being a parallel case, was adjudged in *Michaelmas* term following.

* *Macdonell versus Weldon or Welder.*

Where a lease is made to commence from a day to come, that day is exclusive. Stra. 550.

ERROR of a judgment in *replevin* brought in the Common Pleas, where the defendant avowed, for that T. S. being seised of the place where, &c. in fee, demised the same to the plaintiff for the term of one year; and from thence from quarter to quarter, *quamdiu ambabus partibus placuerit*, each party giving a quarter's warning, to commence from the feast of St. John Baptist, &c. rendering rent, and J. N. was seised in fee, and 30 September 1717. demised to the avowant, who, 21 Apr. 1718. demised to the plaintiff a shop, &c. parcel of the premises, and that the plaintiff *virtute dimissionis predicti intravit & fuit inde possessionatus, in & a predicto festo Sancti Johannis, &c.* and the rent being in arrear at such a time, he (the defendant) distrained, and so justified the taking. The plaintiff in his bar to the avowry pleaded that A. B. was seised in fee, *absque hoc quod predictus T. S. fuit seisitus, &c.* The avowant tendred an issue upon that traverse, to which the plaintiff demurred; and judgment was given for the avowant; and upon a demurrer to this avowry it was argued, that where a lease is made to commence from a day to come, the day itself is always exclusive; and if the lessee enters before the commencement of the lease, he is a disseisor, and no lessee, so no rent due on this demise.

Neither

Term. S. Trin. 8 Georgii, 1722.

Neither can his continuing in possession after the commencement of the lease, transpose it to be an estate for years and purge the disseisin, because the first entry was by wrong; like an ejectment, where, if it appear that the entry was before the commencement of the lease, the defendant could never be possessed by virtue of that lease; and in this case the avowant shews, that the lessee is a disseisor, and the contract between him and the lessor is not sufficient to maintain an action at law; this is not laid as a demise at will.

Upon the first argument.

“ Eyre Just. *Virtute cujus dimissionis intravit* is proper and sufficient without shewing the particular day of entry; and if so, the entry being subsequent to the commencement of the term, will vest in the lessee the possession from the time of the commencement.

It was admitted, that the cases cited in the (a) margin are law; Econtra. but there is a difference where the lessee enters with the consent of the lessor before the commencement of the lease, and where he enters without such consent; for in the last case, the lessee is a disseisor by the wrong done to the lessor; but where he (the lessee) enters with the consent of the lessor, there no wrong is done.

(a) Dy. 89.
109.
2 Rol. Abr.
420.
Cro. El. 766.
pl. 4.
Sid. 8.

It is true, he cannot demand any rent due before the commencement of the term; but yet by his continuing in possession, and by the consent of the lessor, who hath the right, he (the lessor) may have an action for the rent arrear.

“ The entry does not appear to be before the term commenced. “ There is no time to the *intravit*; for in *Et à prædicto festo* can refer only to the words *habuit possessionem*. Besides, it is averred that he entred *virtute dimissionis*.

“ Every quarter amounts to a new demise, it being a lease certain for a year, and then a lease at will; and the avowry is not for rent due during the year, but for a year subsequent to the expiration thereof.

“ This dispute is only between the lessor and lessee; so that the contract ought to be assisted as far as possible.

The court held there was a difference between an ejectment, Curia. wherein the plaintiff is to recover his term, and an avowry for rent; for in the one case the plaintiff must truly make out his title, but so much strictness is not required in the other.

Besides, no act of the lessee shall hurt or impeach the contract between him and the lessor, nor shall his (the lessee's) * entry before the commencement of the lease, discharge the rent; but he shall still be liable to an action of debt for the rent arrear.

Cro. El. 905.
Rol. Abr. 605.
* P. 55.

“ Fortescue Just. As to the point of law, I am of opinion that the avowry is sufficient. Every disseisin is a trespass, but every trespass is not a disseisin. A disseisin is when one enters intending to usurp the possession and to oust another of the freehold: therefore *querend. est à judice quo animo* he entered. And Vol. VIII. “ it

Term. S. Trin. 8 Georgii, 1722.

“ it is at the election of him to whom the wrong is done, if he will
“ allow it to be a disseisin. *Cro. Car. Blundell v. Baugh*, 302, 303,
“ which is a very good case. To make an entry a disseisin there
“ must be an ouster of the freehold, either first, by taking the pro-
“ fits, or secondly, by claiming the inheritance. In this case the
“ entry of the lessee shall be intended only to claim his *interesse*
“ *termini*: but if he had claimed the inheritance, it can be no
“ disseisin *invitis partibus*. Here appears no intention of either
“ party to make it a disseisin, and consequently it is none. An
“ *ejectione firmæ* differs, for there a title must be shewn, and a
“ title to that term of which he is ejected, and which he is to re-
“ cover: and besides, no continuance in possession is there alledged.
“ It will be a hard construction to defeat the contract because the
“ lessee entered a day too soon.

Cro. Jac. 684.
Cro. Car. 302,
434.
Lev. 270.
Salk. 245.

And in this case, the lessee did not only enter before the day, but continued in possession after the day the lease commenced; and that by the consent of the lessor himself; so it shall be in his election to take the lessee for a disseisor by *his tortious entry*; but by no means to be a disseisor when he continued in possession, by the consent of the lessor. So this avowry was held good, and the judgment was affirmed by the whole court.

The King *versus* Bowen Hart, the Mayor, and Bur-
geses of Malmesbury, *Saturday 5 May.*

Information
against a bur-
ges for not
taking the
oaths at the
time of his
election, not
granted.

UPON a motion for leave to file an information against the defendants, upon an *affidavit* of the town-clerk of *Malmesbury*, for that one *Gawen Hart* of the said borough of *Malmesbury*, was admitted to be a capital burges thereof in the year 1714. and had not taken the oaths of *abjuration and supremacy* when he was admitted; a rule was made for the defendants to shew cause why an information in nature of a *quo warranto* should not be filed, and now the defendants produced several *affidavits*, by which it appeared, that the said *Hart* did take all the oaths which were tendered to him at that time, when he was admitted to be a capital burges; and also that he had taken the oaths of *abjuration and supremacy* in some short time afterwards at a quarter-sessions held in *Wiltshire*, and he himself made *affidavit*, that he believed he had taken all the oaths requisite for him to take at the time of the election.

If so, then it plainly appears that he had not neglected to take the oaths out of any disaffection to the government, but meerly because they were not tendered to him by the town-clerk at the time when he was chosen capital burges, he (the town-clerk) being the proper person to tender the same, and who shall be intended to know the penalty in not taking them.

Term. S. Trin 8 Georgii, 1722.

And tho' in rigour of law his not taking the oaths made his election void; yet since it was merely thro' the neglect of the town-clerk, and who had now acquiesced without any * manner of prosecution for above eight years; therefore this burgess ought not to be damnified, especially since this prosecution seems to be carried on at the instance of a great person who offered *Hart's* wife 1000 guineas the night before the day of the last election of members to serve in parliament, to persuade her husband to give his vote and interest to a person who then stood candidate to be chosen a representative for the said borough, which she refused, as appears by her own *affidavit*; and therefore this town-clerk was put on to prosecute the husband. * P. 56.

The question is not concerning the misbehaviour of the town-clerk, but whether this *Hart* was duly chosen a capital burgess; and it seems very plain, that he was not, because the statute requires he should take the said oaths, otherwise his election is void; and if so, it cannot now be made good; neither will length of time, or any pretended ignorance of the statute enable a person to officiate contrary to the express words of the act itself. *Econtra.*

For if he is an usurper, the long continuance in his office will not shelter him from an information, because it is positively required by the statute, that he shall take the oaths before he is admitted to the office.

Pratt Ch. Just. If he did not take the oaths at the time of his admission to be a capital burgess, he is not qualified to be a burgess, and the length of time, wherein he continued to be so, will not obstruct the filing an information against him, but then after so long a time there ought to be a clear proof of his *wilful refusal, or voluntary neglect to take the oaths*; but certainly an information ought not to be granted upon the oath of the *town-clerk* himself, because it was his fault, that this *Hart* did not take the oaths; and it was likewise his duty to discover the not taking them, which he had not done for so many years together; therefore that length of time shall gain a presumption in his favour, especially when by other *affidavits* it is proved, that he took all the oaths he believed to be requisite for him to take at the time of his election.

" If the crown pleases, an information may be filed in the name of the Attorney General, but we cannot file any, but upon probable cause; and none appearing here, the rule must be discharged.

" *Powys Justice* and *Eyre Justice* of the same opinion.

" *Fortescue Justice*: The probability of the evidence is so much of the defendant's side, that if I was to be a juror in this cause, I should acquit him.

" In the case of the *Queen ver. Jefferies* concerning the borough of *Bridgwater*, he took the oath of allegiance three days after
" his

Term. S. Trin. 8 Georgii, 1722.

“ his admission, for which an information was prayed, but denied ;
“ and he was never re-elected. After eight years we ought not
“ to put the defendant to a trial to prove that he took the oath of
“ allegiance at a proper time. It has been held that no tender of
“ the oaths is necessary, contrary to 2 *Leo.* 242, 243.
So the information was not granted, but the rule was discharged.

Abdelard *versus* —

Where money is to be paid at several times, an action may be brought for the whole upon failure of payment of one of the times.

THE case was thus, *ſſ.* A man by marriage articles was to pay 50 *l.* at 5 *l.* *per ann.* till the whole 50 *l.* should be paid, and in failure of payment of any 5 *l.* then he was to pay the whole.

* P. 57. The question was, Whether upon failure of payment of one 5 *l.* an action could be maintained for what was then due.

It was argued, that it could not till all the days of payment were past.

Co. Lit. 292.
3 Rep. 22.
5 Rep. 52.

Besides, the statute for amending the law gives the Judges power, upon payment of principal, interest and costs, to discharge a man after judgment obtained against him for a penalty ; and this shall be deemed an equitable penalty.

Curia.
Cro. Jac. 504;
pl. 16.
Roll. Abr. 29.
Cro. El. 113.
Beckwith *versus* Potts.

The power given to the court by the statute is to stay all proceedings on payment of all that is due ; and in the principal case all the 50 *l.* is due, and no part of it is a penalty, but only the defendant by the condition of these articles had time for the payment of the money by parcels as therein directed, the benefit of which condition is now lost by his breach thereof ; so the plaintiff had judgment.

D E

Term. Sanct. Mich.

Anno 9 Georgii, 1722.

Coleborne (a) *versus* Stockdale.

(a) See this case at large in Stra. 494.

whereby it appears that there were also exceptions taken to the plea, which were likewise held insufficient. This case was cited in Fagg *ver.* Fagg, Mich. term 1742. B. R. and also in Stra. 498. As this case was determined in Hil. term 8 Geo. according to Stra. 496. how came it on again now?

IN an action of debt on a bond, &c. the defendant pleaded, that the said bond was given for money won at play; the plaintiff replied, that it was not given for money won at play; and upon a demurrer to this replication, it was insisted for the defendant, that it was ill, because the plaintiff did not set forth, that the money, or any part thereof, was not won at play; for by the statute 9 Annæ, * it is enacted, *That all securities, where the whole or any part of the consideration is for money won at play, shall be void*; so that it is not sufficient for the plaintiff to alledge, that the money for which the bond was given was not won at play, but he must likewise add, nor any part thereof; for if any part is for gaming money, the entire specialty is avoided by the statute.

Debt on a bond for money won at play.

9 Annæ, cap. 14. * P. 58.

Where the plaintiff hath any manner of right, he may alledge it to support his action, and where the defendant pleads but one fact, there can be but one reply.

Econtra.

The court was of opinion, that the replication was too large and incertain; therefore gave judgment for the defendant.

Curia.

The King *versus* Gibbs.

THE defendant was indicted for selling beer without paying the duty, and upon Not guilty pleaded, the cause was tried, and he was found guilty.

Indictment for selling beer without paying the duty, not good.

And it was now moved in arrest of judgment, that this indictment was insufficient, because it set forth, that the defendant sold beer without paying the duty; but did not shew to whom, or at what time it was to be paid, nor what quantity of beer he sold, and consequently a conviction upon such an incertain indictment cannot

Term. S. Mich. 9 Georgii, 1722.

be pleaded to any other for the same offence; neither can the defendant make any tolerable defence to such an incertain charge.

2 Lev. 39.
4 Mod. 100.

Besides, in criminal cases the utmost certainty is required; therefore the quantity of the offence should have been set forth in this indictment, so as a conviction thereon might have been a bar to all other actions and prosecutions for the same offence; and for this (a) reason the judgment was arrested.

(a) It was held in Stra.

497. that the buyers need not be specified, but the quantities sold must.

The King *versus* Sparling.

Information for prophane cursing and swearing, and a conviction thereon quashed.

Stra. 497.

Ses. Caf.

263. pl. 207.

* P. 59.

S. C. cited in

Andr. 175.

S. P. accord.

in 2 Lord

Raym. 1368.

(b) This was a conviction

before a justice of peace, and was quashed in Hilary term 8 Geo. Stra. 497, 498.

is repealed by stat. 19 Geo. 2. c. 21. which see.

(e) Fost. Cr. Law 87. Ante 45. Stra. 686. but see 2 Ld. Raym. 1376. Stra. 608. contra.

(c) This stat.

(d) See Bur. Rep. 150. 2 Bur. Rep. 1036.

INFORMATION (b) upon the statute (c) 6 & 7 Will. cap. 11. made against prophane cursing and swearing, by which the offender forfeits 2 s. for every oath (other than a *servant, labourer, common soldier or sailor*;) upon Not guilty pleaded, there was a verdict for the prosecutor; and it was moved in arrest of judgment, that this information was too wide and incertain, because it did not set forth, that the defendant was (d) not a *servant, labourer, common soldier or sailor*; for this * being in a criminal case, it shall be intended that he was one of those persons, if it doth not appear that he was not; therefore that matter ought to have been specially set forth; (e) like the case where the defendant pleads a pardon, he must shew, that he is a person not within either, or any of the exceptions.

Besides, the oaths ought to have been specified in the information, that the court may judge of the nature of them; for otherwise the informer makes himself a judge of the fact, and that in his own cause, which shall never be allowed.

Econtra.

It was argued on the other side, that this information was good, for if the defendant was *either a servant, labourer, common sailor or soldier*, he ought to have pleaded it, or to have given it in evidence at the trial; but for the reasons above-mentioned the conviction was quashed.

Burr

Term S. Mich. 9 Georgii, 1722.

Burr versus Davall.

THE (a) case was, *ff.* Sir Thomas Davall had two sons, and being taken ill on the 15th day of April 1719. he made his will about four days afterwards, and devised his estate in *Essex*, being about 1600 *l. per annum*, to his eldest son, and the heirs of his body, and his *Middlesex* estate being about 1700 *l. per annum*, to his youngest son, and to the heirs of his body; and that if either of his said sons died without issue, then the estate of him so dying should remain and go to the survivor; and if both his said sons should die (b) with issue, then he devised the whole estate to Daniel Burr (the lessor of the plaintiff) and his heirs.

vall's will; the trial was at the bar of the King's Bench; it was tried and finished before this term. (b) Instead of without issue.

Both the sons died without issue, and the Lady Davall, the widow of the testator, and who was his heir (b) at law, endeavoured to set aside this will.

dow, but not his heir at law; and was not at all concerned in the cause; indeed she was daughter to Lydia Vanhattem, niece to the two Mrs. Davall's, and first cousin to Mrs. Bovey; but she had a brother living, Mr. John Vanhattem. The testator's heir at law were the said Lydia Vanhattem, Elizabeth Davall, Mary Davall, and the said Catherine Bovey.

And the question was, If Sir Thomas, the testator, was *compos mentis* at the time he made this will; and to shew that he was not, it was argued, that a father in his senses would not have left his youngest son a greater estate than he left to his eldest, who had only his *Essex* estate, and by articles in marriage he was bound to leave his younger children 10000 *l.* out of that estate, and his Lady 600 *l. per annum* jointure out of that very estate.

Besides, If the testator had been in his senses, the words in his will would not have carried an estate to the lessor of the plaintiff, for the devise was to his sons, &c. and that if both die *with issue*, instead of *without issue*, then * to Daniel Burr, so that this being * P. 60. a condition precedent, the plaintiff can have no estate by this will.

Neither shall the probate thereof by the executor add any strength to it in this court, since the defendant was next heir at law to the testator at that very time; so it was held in the case of Sir George Markham and the Lord Mountague, where the will was proved by the heir at law; yet by the judgment of this court confirmed on a writ of error in the house of lords, it was avoided as to the real estate.

It is no objection to say, that the testator was not *compos mentis*, Econtra. because he did not dispose his estate with that prudence another man might have done, for he himself is the proper judge why he devised

Term. S. Mich. 9 Georgii, 1722.

wised it in that manner; and it is very propable, that in his last sickness he did not remember out of which part of his estate his wife was to have her jointure; so that if this will should be set aside for the reason suggested by the defendant's counsel, then there would be but little room left for a man in his last sickness to make any settlement or provision for his family.

At this trial the counsel for the plaintiff objected against a witness produced by the defendant to prove, that the testator was not *compos mentis*, (*viz.*) That he was to get by the success of this cause.

Witness, an objection to him.

To which it was answered, that there were but two ways of excepting against a witness, (*viz.*) Either as to his oath, or by proving that he was a disabled person, and this must be done on the other side.

Words in a will must be taken in that sense which is consistent with reason.

Then if there should be any doubt, Whether the words in the will were *dying with issue*, or *without issue*, it ought to be taken in that sense which makes the will consistent with reason and good sense: the jury found for the plaintiff.

The King *versus* The Inhabitants of St. Peter's Oxford.

A servant shall be settled where he serves, and not where he was hired. Stra. 528. Fortesc. Rep. 518.

* P. 61.

Fol. 277.

S. P. accord. in 2 Sef. Cas. 137. pl. 125. Fortesc. Rep. 308. Ld. Raym. 683. Cas. of Set. and Rem. 16. pl. 23.

THIS case was moved in last term, but ruled in this:

J. One *Disney* was hired in the parish of *St. Peter's in Oxford*, by *Stonell* his master, who kept a stable of horses at *Chipping-Wickham*, for the *London* road, and there he served a whole year, and not in the parish of *St. Peter's*, where he was hired; afterwards, being likely to be chargeable, he was removed by an order of two justices, to the parish of * *St. Peter's*, where he was hired, and where his master lived, which order was confirmed upon an appeal.

And now upon a *certiorari* to remove the said orders, it was moved, that they may be quashed, because it appears by the original order, that this man was settled at *Chipping-Wickham*, for there he served a whole year; and tho' the *hiring* was in *St. Peter's* parish, yet it is not that, but the *service* which makes the settlement.

Econtra.

It was insisted on the other side, that it is more reasonable the settlement of the servant should be where his master lives, than elsewhere, because the master might settle his servant in any parish where he pleased, tho' he did not live there himself.

Curia.

The court was of opinion, that this man was settled at *Chipping-Wickham*, for it is the service, and not the hiring, which makes the settlement; and this is a common case, for if a man hath lands in two parishes, and keeps house, and lives in one parish, and hath

a stock of cattle in another parish, and servants there to look after them, they shall be settled in the parish where they serve, and not in the parish where they were hired, and where their master lives: So the sessions order was quashed; and that of the two justices also.

The King *versus* Fairclough and others, Inhabitants of Lambeth parish.

THE case was, // The rector of the parish of C. by a verbal agreement let his tithes to *Fairclough* and others, paying to him 2 s. 6 d. per acre for one year, and *Fairclough*, and the other farmers of the said tithes, let the same to the respective tenants of the lands, paying to them 3 s. per acre for that year, excepting one tenant, for which they received tithes in kind, and paid to the rector 2 s. and 6 d. per acre.

Afterwards they the said *Fairclough* and the other farmers were charged by the churchwardens and overseers of the poor of the said parish of C. by a rate, towards the maintaining the poor of the said parish, upon the statute 43 *Eliz. cap. 2.* as occupiers of the tithes; and upon an appeal to the sessions they were discharged as to all, excepting only 7 s. and 6 d. which they were ordered to pay for the tithes of that tenant, which they received in kind.

And all this being removed into B. R. by *certiorari*, the question was, who shall be accounted the occupiers of those tithes, either the farmers who paid the rent to the rector, * or the tenants of the lands who paid their rent for the tithes to the farmers.

It was argued by Mr. *Reeve*, that the farmers were not to be charged as occupiers, they having let the tithes to the tenants of the lands; and that it is a settled point, that the rector is not an occupier when he lets his tithes to farm; and the reason is the same, that the farmers shall not be occupiers when they let the tithes to the land-holders, therefore they, and not the farmers, may properly be accounted the occupiers; for if the farmers had made an underlease to T. P. who had by virtue thereof let the tithes to the land-holders, they had been the occupiers of the tithes.

It is true, in strictness the land-holders have not the tithes till they are severed from the nine parts, but they have the substance thereof, (*viz.*) the profits, and it is for that reason they shall be charged as occupiers, for the farmers have only a dry rent out of the tithes, which may be double that value to the land-holders, and they (the farmers) never bought the tithes, but pay so much for them to the rector for a year, and the land-holders pay so much to them (the farmers); therefore they may be charged at any time of the year by the parish-officers, for the right of the tithes is in them all the whole year, and not in the farmers.

The rector made a verbal lease of his tithes for a year, the lessee lets the tithes to the respective land-holders for 6 d. per acre more than he was to pay to the rector; adjudged, that the lessee is the occupier of the tithes, and to be charged to the poor rate. Stra. 525. * P. 62. Fortesc. Rep. 318. Cal. of Set. and Rem. 106. pl. 140. Fol. 25.

Term. S. Mich. 9 Georgii, 1722.

Econtra.

On the other side it was argued by serjeant *Whittaker*, that the farmers shall be accounted the occupiers of those tithes, and that in regard of the 3 s. *per acre* paid to them by the land-holders; and that it is impossible for the parish-officers to charge any other than the farmers, as occupiers of the tithes, because the land-holders only purchase them at harvest, and therefore are no more occupiers than strangers, who may buy them at any time, if the land-holders do not agree to purchase them, so that the farmers having got the value of the tithes, shall be accounted occupiers thereof; and the land-holders cannot be charged with respect to the value of the tithes, because the farmers have the value; therefore they (the land-holders) cannot be occupiers when the farmers receive the profits.

And the court was of that opinion, (*viz.*) That the farmers shall be accounted the occupiers of those tithes; it is true, it might be otherwise if an under-lease had been made thereof; but this is a particular case; and it appears by the rate, that the farmers have 6 d. *per acre* profit; and if the rate is assessed on the profits of the tithes, it ought to be assessed on them, because it doth not appear to the court, that the land-holders had any profit, for they may have a hard bargain.

Cro. Jac. 137. * P. 63. Therefore they shall rather be accounted buyers of those tithes, than occupiers; for where an agreement is made for * tithes, they shall pass by way of bargain, otherwise they cannot pass at all, because they lie in grant; and therefore cannot otherwise pass than by deed, for a verbal agreement for them is good only for a year.

The money which the farmers receive of the land-holders for those tithes shall be accounted a *modus*; and wherever there is a *modus*, he who receives it shall be taken to be the occupier of the tithes.

So where a man hath a wood or standing corn, and sells the same standing, the seller shall pay the tithes for that year.

In this case the rector who serves the cure for 2 s. 6 d. *per acre* shall not contribute to the poor's tax; but the farmers who have such a benefit of six pence *per acre* without any manner of consideration for it, by raising so much on the land-holders.

" *Pratt L. C. J.* I doubt that the farmer of the rector is to be esteemed *primâ facie* occupier of these tithes: he retains the tithes, tho' he pays the value for them.

" *Eyre Just.* The farmer is in this case the occupier, he having them by way of retainer, in pursuance of an agreement by parol. It would be otherwise if there had been an under-lease of them.

" *Cro. Jac. 137. pl.*

" *Fortescue Just.* The farmer is occupier, he having them in such a manner as to make a profit of them.

Therefore the sessions order was quashed, and the rate confirmed.

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Term. Sanct. Hill.

Anno 9 Georgii, 1722.

The King *versus* Gage.

UPON a motion to quash a conviction for keeping a grey-hound, and killing four hares, for which offence the forfeiture is * 5 l. if not qualified; the case was thus:
ff. The statute directs, that the *conviction shall be made within three months after the offence, upon the oath of one or more credible witness*, which was not done in this case; for the man was convicted upon *his own confession*, which is not within the statute; and for that reason, if the justice of the peace had seen him kill a hare, he could not have convicted him upon his own view, because that is not such a conviction as is required by this statute, and he hath no power in this case, but what he deriveth from thence; therefore the act ought to be pursued, and especially where it is penal, as this is, where the forfeiture relates to the conviction; and if it is not *upon oath* as the statute directs, then nothing is forfeited.

* 5 Annæ, cap. 14. confession of the offence is a sufficient conviction, tho' the statute directs it shall be on oath. Stra. 546. * P. 64.

† The words being, that every person so convicted.

It is true, if this was an offence at common law, it might be otherwise; but being made so by a particular act of parliament, the method of conviction must be pursued as therein directed.

It is like the case of removing a poor man to the parish where he was last legally settled, which by the statute is directed to be *at the complaint of the churchwardens and overseers of the poor*, &c. Now if all the rest of the parish should complain to the justices, and not those *parish-officers*, it would not justify their making an order to remove the man, because the statute directs, that it must be made *upon the complaint of the churchwardens and overseers of the poor*.

On the other side it was argued, that the confession of the offender is *within the intention*, tho' not within the letter of the statute; for the chief end of that law was to give jurisdiction to the justices of the peace; now the *confession of the party* being the strongest evidence against himself, therefore where a justice of the peace convicts an offender upon a better and stronger evidence than required by the statute, such conviction must be good, especially since

Econtra:

Term. S. Hill. 9 Georgii, 1722.

since the act is only directory, (*viz.*) That the justices shall not convict without good evidence.

As where a statute directs, that a promissory note shall be payable to one, or his order; yet where it was made payable to one alone without the word *order*, it was held good, and within the statute.

(Curia.

By the opinion of three Judges this is a good conviction; for it is plain that the defendant was guilty of the offence; and if his confession had been made any where else, and not to the justice of the peace, yet if such confession had been proved, the justice might have convicted the offender; now here was a stronger evidence of his guilt than required by the statute; and therefore his conviction shall be good.

* P. 65.

* If a man comes into court, and confesses himself guilty of high treason, such confession is good against him, and even in penal laws, the intention of the legislators is the best method to construe the law; now the intention of this statute seems to be not in what method or manner of proof the offender shall be convicted, but that the conviction should be on good proof, and a better cannot be had than the confession of the party against himself.

The legislators could not foresee all the cases which might happen upon this law; therefore the conviction on oath was only directory to the justices of the peace, and by the civil law no man is to suffer without confessing the crime of which he is accused. So this conviction was affirmed.

(a) Gilb. Cas.
282.
10 Mod. 248,
341, 378.
Sef. Cas. 346.
pl. 273.
Stra. 44.

"*Eyre* Just. In the case of *The King* ver. (a) *Simpson* for deer-stealing, upon 2 & 3 W. & M. c. 10. when the defendant made default, and did not appear, he was convicted: and it was adjudged a good conviction, though that act did not expressly give authority to convict upon default;" for that by the statute 22 Car. 2. he who keeps a *greyhound* not being qualified, is punishable; and the conviction is to be by *oath or confession of the party*, which statute is confirmed by this of 5 *Annæ*, so that these laws shall both stand together.

Now the statute of 5 *Annæ* having directed that the conviction shall be upon *oath*, whereas the other is by *confession or oath*; it seems that the legislature by this last act intended, that the manner of conviction by confession should still be on the statute 22 Car. 2. and not on the statute 5 *Annæ*, for by that statute the conviction is to be upon oath; for if a man might be convicted on this last act on *his own confession*, there had been no occasion of confirming the statute 22 Car. 2. *Per cur.* (*Eyre dubitant.*) Let the conviction be confirmed.

The

The King *versus* Watson.

UPON a motion to quash a conviction for a forcible detainer Conviction of forcible detainer quashed. * 15 Ric. 2. cap. 2. upon the * view of the justices of peace, the objection was, that it was set forth, the defendant *held a chamber in an house in such a street, in the parish of St. Margaret Westminster, by force;* but did not alledge whose house it was, or where it was situate, nor whether the chamber was forward or backward, or how many pair of stairs were up to it; so that if there should be two chambers in this house, the sheriff could not know of which to deliver the possession.

Besides, the commitment of the defendant was to *Newgate*, and it was not alledged that *Newgate* was the county-gaol, and if not, then the justices have no power to commit thither, because the statute expressly requires, that the commitment shall be to the † county-gaol. † See the statute, it is to the next gaol.

* To which it was answered, as to the first objection, that this conviction was very incertain as to the chamber, &c. the court will not intend, that there were two chambers on one floor; it ought to appear that there were two, which it did not in this case, and as to the house in which this chamber was, that is sufficiently described. * P. 66.

The other is the most material objection, (*viz.*) That by this conviction and commitment it did not appear that it was to the county-gaol; but as to that matter that court may judicially take notice that *Newgate* is the county-gaol; and to prove this the year-book, 16 Ed. 4. fol. 55. was cited.

But upon reading the record, the words in the adjudication were all in the preterperfect tense, when they ought to be in the present tense, and for that reason the conviction was quashed; and in *Trin.* term following, in the case of the King *ver.* *Morgan*, there was the like judgment for the same fault.

The King *versus* Sprigg and Oakley.

THE defendants were tried at the *Old-Baily* upon an indictment for piracy in sinking a ship near the *Isle of Man*; the evidence was thus: Indictment for piracy.

¶ *Sprigg* bought this ship, and made the other defendant *Oakley* master thereof, and having freighted her, he insured 500 l. on the ship, and 400 l. on the cargo to the *West-Indies*.

Afterwards they put to sea, and run the goods upon the coast of *England*, and they put to sea again, and about two days afterwards the ship was sunk, and then he protested at the next port, that both the ship and cargo were lost.

The proof against the master was, that the day before this ship was lost, he took notice that the ship's boat was out of repair, and desired some of the men to stop the chinks therein, for that he did not know how soon they might have occasion to make use thereof.

That the next day he desired one of the sailors to see how deep the water in the pump was, who in a quarter of an hour before had pumped till it was no more than two inches deep; but now to his great surprize found it seven inches deep; thereupon he and the rest of the ship's crew began and continued to pump, but still the water became higher in the ship, and within half an hour was fifteen inches high.

* P. 67. * Thereupon this sailer who first pumped, and some of the rest of the ship's crew, offered to go down into the hold, but the master would not suffer any of them to go down, nor any body to be there besides himself and *Sprigg*, who was all the time below, which was proved by the sailors; and that the water could not flow in so fast, unless the ship was bored or broken in the bottom.

The proof against *Sprigg*, the owner, was, that a day before the ship put to sea he bought an *augre*, which was an inch and an half wide in the bore; that the ship had *augres* enough before, and that there was no manner of occasion for so wide an *augre*, and that he was under deck all the time the sailors were pumping, and as they believed, boring the ship.

But the evidence being only presumptive against both the defendants, they were acquitted.

(a) Post 74. *Nota*; This differs from (a) *Mason's* case, for there the goods of another were delivered upon a special trust to carry to *Malaga*, but here the goods were the property of *Sprigg* himself, and he could not be indicted for stealing his own goods, with an intent to charge another, because there must be a felonious *taking* as well as a conversion; now there could be no felonious taking, because he himself was the owner, and in possession of the goods.

Term. Paschæ,
Anno 9 Georgii, 1723.

Wivell *versus* Stapleton.

BY certain articles of agreement it appeared that the plaintiff had sold to the defendant 200*l.* *South-Sea* stock for 1425*l.* the plaintiff covenanted on or before the shutting of the books to transfer so much stock, upon payment of the said sum of 1425*l.* and the defendant covenanted to accept the same, and *ad tunc & ibidem* to pay the money for the said stock *at or before the shutting up the books for the Christmas dividend*; and it was farther agreed, that if the defendant did not accept the said stock, then the plaintiff might sell it to any other person at the *market price*, and return the overplus, if it sold at any higher rate; but if it sold at a lower rate, then the defendant agreed to make up the deficiency to the plaintiff.

What shall be mutual covenants, and what not. Ante 40, 41. Post 105, 292, 314, 381.

And a bond being given for the performance of the agreement, an action of debt was brought thereon; and the breach assigned was, for that the defendant did not pay the deficiency of the said sum of 1638*l.* for the stock.

The defendant pleaded, that he was to receive the stock, &c. and that he made a feoffment to the plaintiff of such lands in satisfaction of 1360*l.* then due on the said covenant, &c. but did not aver that the plaintiff *accepted it* in satisfaction; nor make a full defence by *quando*, &c. did he set forth, that he made the feoffment in satisfaction of the penalty then due, on the forfeiture of the bond; but upon a demurrer to the plea, the defendant had judgment in the Common Pleas for faults in the declaration.

* And now upon a writ of error in *B. R.* the plaintiff in error insisted, *First*; That these being mutual covenants to pay money on such a day, &c. and the other being to transfer the stock, the default of payment on that day is a forfeiture of the bond: and there was no necessity to aver any tender.

It is true, the agreement was to pay the money for the stock, but the word *for* in this case doth not make it a *precedent condition*, (*viz.*) That the stock should be actually transferred, or a transfer tendered.

Term. Pasch. 9 Georgii, 1723.

tendered before the money should be paid, but that particle *for*
 * Saund. 319. shews what the consideration was; so are the cases in * *Saunders*
 2 Saund. 350. cited in the margin; so that if the agreement had gone no farther,
 180. 1. these had been mutual covenants.

Secondly; It is true, there is a farther agreement, that the plain-
 tiff himself might transfer to another, if the defendant did not ac-
 cept the stock; but that being for his own security, doth not alter
 the nature of the mutual covenant.

Thirdly; If it should be objected that the declaration is ill, be-
 cause no day or place is set forth for the transferring, or the tender
 to transfer the stock; the answer is, that the day is set forth, (*viz.*)
 That on *such a day* he was ready at the office of the South-Sea house,
 to transfer, &c. and this tender at the office is like the tender of rent
 at an house, which is the most notorious place of the premisses de-
 mised, for the office is the most notorious place of the South-Sea
 house; and by the statute 6 Georgii, which is a publick law, notice
 is taken of that house: so that the court will intend that was the
 place of tender.

Fourthly; But if it should not be so intended, yet the defendant
 having pleaded that he gave a feoffment in satisfaction of so much
 money then due, this is an implied admission, that the plaintiff had
 done every thing necessary to be done, to entitle him to this action;
 and so is *Cro. Car.* 384. *1 Kent.* 114, 126.

It is true, those cases were after verdict, but as to this matter,
 there is no material difference between a verdict and a demurrer,
 when the fault doth not touch the point in issue upon the verdict,
 but arises on a collateral matter.

Econtra.

It was argued for the defendant, that the judgment given in the
 Common Pleas was for the faults in the declaration, (*viz.*) For not
 laying an actual transfer, or a tender of a transfer, and for not as-
 signing the day and place of such tender, according to the resolution
 in *Lancashire* and *Killingworth's* case.

* P. 70.
 Answer to
 4th obj.

* Now, admitting the plea is not good; yet if the declaration is
 bad, the plaintiff cannot have judgment, and certainly that is not
 good; and if not, it cannot be helped by a bad plea, for that is ex-
 pressly resolved in 8 Rep. 120. (*viz.*) That if the declaration is bad
 in substance, no implication in a plea shall mend it, which is cer-
 tainly true upon a demurrer to the plea; and so is *Sid.* 336. tho' it
 might be otherwise after a verdict; and the cases cited on the other
 side were after a verdict.

To 1st obj.

To 3d obj.

But this declaration is ill, because the plaintiff did not alledge,
 that he had actually transferred the stock, or tendered to transfer it
 on such a day, and at such a place; and these are omissions which
 make the declaration ill; it is true, the plaintiff hath alledged, that
 he was at the office in the South-Sea house on such a day, ready to
 transfer, but that is not good; for tho' an act of parliament takes
 notice of the South-Sea house, and for that reason it may be intend-
 ed

Term. Pasch. 9 Georgii, 1723.

ed the place of transfer, yet it doth not take notice at what time it was to be done, nor of any thing to be done at the *South-Sea house*; therefore the plaintiff should have set forth at what time he was there, and that he stayed till the last hour of the day, for that is the time appointed by the law to make a tender, unless there is a special custom to the contrary, and no such custom is alledged. Tender, how to be pleaded.

But the *time* alone is not sufficient, without setting forth the *place of tender*, which was not done; and as to the transfer, the words in this agreement *ad tunc* to pay the money, must relate to the transfer, and not to the day of payment; as in *Lutw.* 490. where the covenant was, that the plaintiff would accept so many shares on such a day, and *ad idem tempus* to pay, &c. there these words *ad idem tempus* were adjudged to relate to the time of the acceptance of the shares, and not to the day of the payment of the money; and this case differs from the case of *Blackwell and Nash*, for there the money was to be paid *at or before such a day*.

The plaintiff, who sold the stock, was to transfer it on such a day, on payment of so much money, and the defendant was to receive the stock and then to pay the money. This being the case, the question is, Whether these are mutual covenants; and three judges held they were (b) not, but that they were independent covenants; and that the plaintiff need not set forth in his declaration, that he tendered to transfer, &c. because (c) it was to be transferred upon payment of the money; so that the defendant having by this agreement made himself the first agent, he was obliged to pay the * money before the plaintiff was to transfer the stock; and then if he should deny or refuse to transfer, the defendant might have an action to compel him, because he is intitled to the whole stock; for the plaintiff had no authority to sell it till the defendant had refused to accept it; therefore he being intitled to the whole stock, the plaintiff is intitled to the whole money agreed to be paid for it, and may well maintain this action; and for this reason the judgment was reversed by the opinion of three judges. (a) Curia.
(a) What was said by Pratt Ch. J. and what by Fortescue J. are here confounded together.
* P. 71.
(b) I take it that the words mutual and independent were used as synonymous terms: And Pratt said, that these covenants were mutual and

independent. (c) This reason was given by Fortescue J.

But Justice *Eyre* held, that the judgment in the Common Pleas ought to be affirmed; and first he denied, that the plea made the declaration good; for a bad plea can never mend a bad declaration, (d) especially if both are bad in substance as these are.

And as to the principal point, he was of opinion that these were mutual and reciprocal covenants as to the transferring the stock and payment of the money; and that upon such a covenant, the plaintiff might maintain an action without laying in his declaration an actual transfer or tender to transfer the stock; but that this action was brought for a deficiency of 1638 l. after the plaintiff had raised 322 l. by the sale of the stock to pay himself, so that the breach was assigned upon an independent, and not upon a mutual covenant. (d) Quære if he did not assert this absolutely, without adding the words in Italic.

Term. Pasch. 9 Georgii, 1723.

Tender when
to be made.

Now by the exprefs agreement fuch fale of the ftock was not to be made until the defendant failed in payment of the 1638 *l.* and it doth not appear by this record, that he did fail in payment thereof; for to fhew fuch failure, the plaintiff ought to fet forth that he did tender a transfer in due time and place, and that on the laft instant of the day, becaufe the law hath made that the time of tender, unlefs there is a fpecial custom to the contrary, which is not to be intended againft this implication of law.

There is likewise another fault in this declaration, for by this agreement (if the defendant fhould refufe to accept the ftock) the plaintiff had authority to fell it at the *market-price*; but he hath not fet forth in his declaration, that he fold it *at the market-price*, which he ought to have done, becaufe he was to refund to the defendant the furplus of the money after he had paid himfelf; it is true, the defendant was to make up the deficiency, but the plaintiff hath laid the non-payment thereof as a breach of this agreement, without fhewing what right he had to it; and he cannot have a double remedy, (*viz.*) One for non-payment of the deficiency, and another for the breach of the mutual covenant.

* P. 72.

* He agreed that the plaintiff had affigned a breach of the mutual covenant, but that he did not rely on it; but went farther by faying, that he paid himfelf 322 *l.* therefore he fhould fhew that he had a right fo to do; fo that this breach which he had affigned was only as a general breach, and introductive to his action, the real caufe whereof was the fecond breach affigned, (*viz.*) The non-payment of the deficiency.

Now if there was not a fufficient tender of the transfer, the plaintiff could not intitle himfelf to this action upon the fecond breach affigned, becaufe he did not lay a tender in proper time and place; for if the office at the *South-Sea houfe* was not a proper place of tender, or to transfer the ftock, then the plaintiff could not bring his action for this deficiency; and for ought that appears to the court, the defendant was ready to pay the money at the time and place, becaufe it doth not appear that the plaintiff was there at the laft instant it could be tendered.

“ But if there is any thing particular, as that a transfer can only
“ be made between certain hours, as between 11 and 1 o’clock, it
“ muft come on the defendant’s fide.

But afterwards in *Michaelmas* term 11 *Georgii*, the judgment was reverfed, by the opinion of the Chief Juftice, and two other Judges.

“ *Pratt* Ch. J. delivered the refolution of the court:—The aver-
“ ment of the tender is infufficient, being alledged to be made at
“ the *South-Sea houfe*, without fhewing *that* to be the *ufual* place
“ for transferring; the plea is alfo infufficient; fo that the queftion
“ refts only on the declaration; if it appears that the plaintiff was
“ intitled to fell the ftock, then the declaration is good; the cove-
“ nants

Term. Pasch. 9 Georgii, 1723.

“ nants are mutual : so that there is no necessity to aver any transfer of the stock or tender thereof; the defendant covenants to accept before the shutting of the books; the time of payment is not tied up by the covenant to the time of acceptance; the time of acceptance is any time before the shutting the books; so is payment, which is the true construction of the words *adtunc* & *ibidem solvere*; for otherwise the defendant by non-acceptance of the stock might prevent his obligation to payment; covenant for payment is not expressed to be *super transference*, but in *consideratione præmissorum*; which is intended the covenant to transfer: and this construction seems the intent of the parties, which is the true rule of construction.

“ This judgment of reversal was afterwards reversed in the house of lords. See *post* 381.

Lovelock *versus* Sorrel.

A Lease was made to *W. R.* and afterwards the lessor brought an action of covenant against the assignee of an assignee, for not repairing, but did not set forth the intermediate assignments.

The defendant pleaded, that this lease did not come to him by any mesne assignment of the lessee, to which plea the plaintiff demurred.

And it was insisted for him to maintain the demurrer, that the plea was too general, and altogether immaterial; for if the defendant had the land by any assignment from the original lessee, he is subject to this covenant; therefore he should have pleaded, that the lease did not come to him, and not that it did not come to him by any mesne assignment; and so is 1 *Sand.* 238, 285. and 2 *Sand.* 188.

On the other side it was argued for the defendant, that in an action of covenant against an assignee of a lessee, the plaintiff should specially set forth all the intermediate assignments, and shew how the defendant came to the land, and not as assignee generally.

* But this was denied by the court, and adjudged, that the declaration was good against the defendant as assignee general, because it may often happen that the lessor may not know all the intermediate assignments.

There was no judgment given this term, but in *Trinity* term following an objection was made to the declaration, (*viz.*) That the plaintiff had declared on a lease for years *ad hoc venturam*, when by the very record it appeared, that the lease was expired by the effluxion of time, therefore he had declared on another lease; but the court gave no judgment as to this point; but said, that in all actions of *trover*, the usual form of declaring was, that the goods came to the defendant *per inventionem*; but it would certainly be an immaterial plea, if the defendant should deny the finding, as in *Sand.* 238, &c. See 2 *Mod.* 217. *Show. Rep.* 155. *pl.*

Anonymus

Covenant for not repairing brought against an assignee of an assignee; the plaintiff need not set forth the intermediate assignments.

Econtra.

Curia.

* P. 73.

Anonymus.

Scire facias
will not lie for
costs without
shewing that
the judgment
was affirmed
in the Exche-
quer cham-
ber.

A Judgment was given in the King's Bench, and upon a writ of error brought in the Exchequer-chamber, that judgment was affirmed; and now the plaintiff in the action brought a *scire facias* for the costs he had sustained by the delay of the execution; and it was objected, that it ought not to be allowed, because it was brought in *London*, and not in *Middlesex* where it ought to be brought; and for a default in the writ itself, because it did not set forth what became of the case in the Exchequer-chamber, (*i. e.*) it did not shew that the judgment was affirmed; for if it was not, then the plaintiff hath no right to the costs.

On the other side it was answered, that a *scire facias* may be laid in any county where the original action was brought; and all that is necessary to be alledged in it, is, that judgment was given for the plaintiff, and is not satisfied.

So if an action of debt should be brought on the original judgment, such action might be laid in any county, and the *scire facias* may be brought where that judgment was obtained.

Caria.

It is true, an action of debt upon the original judgment, or upon a recognisance, may be laid in any county, but a *scire facias* must always go into that county where the execution on the original judgment should be made.

* P. 74.

* Afterwards, upon reading this *scire facias* it was as before observed, that it did not set forth what became of the cause in the Exchequer-chamber, and certainly the plaintiff cannot have this writ without shewing what became of the judgment removed by this writ of error; and it is unreasonable he should have it for costs in delay of execution, without shewing that the judgment was affirmed in the Exchequer-chamber.

The King *versus* Mason.

Indictment for
piracy.

THE defendant who was *master of a ship*, was indicted and tried upon several indictments at the *Old-Baily*, before Sir *Henry Penrice* Judge of the Admiralty, and several other civilians, and before some Judges of the Common Law assisting them; and this by virtue of a * commission under the great seal, &c.

* According
to the statute
28 H. 8. cap.
15.

The first indictment on which he was tried, was for maliciously and *piratically burning* a ship, to the great damage and defrauding both the owners and insurers, *contra pacem*, &c. & *contra formam statuti*, &c.

The fact upon the trial appeared to be as followeth:

¶ The ship was laden with linen at *Rotterdam*, and bound for *Malaga in Spain*, and when the defendant received the bill of lading

Term. Pasch. 9 Georgii, 1723.

lading he was ordered by the merchants and owners to put in at *Lynn Regis* in *Norfolk*, in order to get a *Mediterranean* pass for his safety; and when he came near *Dartmouth-bay*, it was proved by one witness (who was the carpenter of the ship) that the defendant tampered with him to know what he would take to knock the ship in the head; and it was proved by another witness, that the defendant gave the ship's crew some bowls of punch on that day the ship was burnt, and made them all drunk; and afterwards ordered this witness to make a fire in the cabin, where there was none for a month before that time; which he did when the defendant and most of the crew were going ashore, except two who were very drunk; and that there was but one bucket belonging to the ship, which the defendant had ordered a sailor to fling overboard the day before the ship was burnt.

The two sailors who remained drunk in the ship, made oath, that they were sleeping there till the ship was so much on fire that they could not relieve her nor themselves, but that they were carried off by another ship's boat then in the harbour.

* Upon this evidence the presumption was very strong, that the ship was burnt by that fire which was first made in the cabin; but this being only presumption, and no direct proof, the defendant was acquitted. * P. 75.

He was afterwards tried upon another indictment for *piracy*, in stealing the goods which he had at *Rotterdam* on shipboard, and consigned to such a place, (*viz.*) to *Malaga*; and the evidence against him was, that the goods were delivered to him, and that afterwards he got both the ship and cargo insured at *London* and *Rotterdam*; and when he came to the coasts of *England*, he privately run all the goods, and when the ship happened to be burnt, he came to *Dartmouth* and protested both ship and cargo as burnt and lost (according to the method of protesting insured ships) tho' the cargo was privately run by him as before-mentioned, which was proved by several witnesses.

To prove the delivery of the goods to him, an exemplification of the entry thereof was offered in evidence, which entry was made in the custom-house books at *Rotterdam*, and attested by a publick notary, and sealed with the publick seal there; but the court would not admit this exemplification to be given in evidence; thereupon the owner of the goods proved the property and the delivery, &c.

The counsel for the King against the defendant laid down this for a rule, (*viz.*) That all acts which amount to felony at land, the same would amount to piracy at sea; that upon this evidence it plainly appeared that the defendant had run the goods *animo furandi*, which if done at land would be felony; as for instance, if goods are delivered to a carrier, and he steals them *animo furandi*, it is felony, and so is this piracy; for it appears, by his protesting that the ship and cargo was burnt and lost, that he designed to cheat both the owners and insurers.

Term. Pasch. 9 Georgii, 1723.

It is true, if a master of a ship runs goods, with an intention to cheat the King of the duties, this is no piracy, though the goods should happen to be seized as forfeited to the crown for not paying the duties.

But here by the defendant's protesting the goods to be lost, when they were not, but privately run by him, this must be with an intention to cheat and defraud the owners, for it was done *animo furandi*, and his intention makes it piracy, as a felonious intent makes the action felony.

* P. 76. The defendant produced an instrument in writing, under the merchant's hand who freighted this ship (as he pretended) by which he had authority to run the goods, as he should * find opportunity; but upon inquiry and proof this seemed to be a forgery, for the merchant, on oath, denied his signing the instrument; and the witness to it being now produced to prove the signing it, made oath, that he did not know the merchant therein mentioned, but that the defendant and another were at a publick house in *Rotterdam*, and sent for this witness, who came, and then the defendant told him, that the other person there present was his merchant; and that he sent for him to be a witness to the power his merchant gave him; and thereupon the instrument being ready drawn, that other person signed it, and this witness attested it; all which gave room for a presumption, that he intended the running the goods before he left *Holland*, *animo furandi*.

But notwithstanding this evidence, the Judge of the Common Law, who assisted the Judge of the Admiralty, directed the jury to acquit the defendant, for that the goods were delivered to him upon a *special trust* to deliver them at *Malaga*, and that it could be no piracy to convert those goods in a fraudulent manner, until that special trust was determined, no more than it could be felony in a carrier by converting of goods delivered to him to carry to such a place before that special trust was determined; and this appears to be the law of *England* by concurrent resolutions in several * law-books.

3 Inst. 107.
Hale's Pleas
of the Crown
61.
Staundf. 25.
13 Ed. 4. 9.
Kelynge 81.

* *Nota*; The case in *Kelynge* 81. was thus: *ff.* A man came to *Smithfield* market to sell a horse, and a jockey coming thither to buy a horse, the owner delivered his horse to the jockey to ride up and down the market to try his paces, but instead of that the jockey rode away with the horse; this was adjudged felony.

And certainly it is felony, but different from *Mason's* case before-mentioned, because the horse was not delivered to the jockey upon any special trust, as the cargo was to *Mason*, but was only a general delivery, and no more than the common case of a shop-keeper, shewing or delivering goods in his shop to his customers, where a conversion of such goods is certainly felony.

But the delivery of goods upon a *special trust* is commonly publick and notorious, and therefore if the party converts them before that trust is determined, it is not felony, because he may have a proper remedy by a civil action, (*viz.*) By an action of trover to recover damages.

Thereupon

Term. Pasch. 9 Georgii, 1723.

Thereupon the counsel for the King insisted, that though this was not piracy *before the special trust was determined*, yet the breaking open some bales of linen on board this ship made it piracy, for this was a conversion with force and *animo furandi*; and that it would be felony in a carrier to break open any boxes delivered to him, and to convert them *animo furandi*, for such a conversion by force is felony, though the special trust was not determined.

* But the court held there was a difference between opening * P. 77. bales of linen, and breaking open locks or nails of boxes by a carrier, and that this was no *piracy*; whereupon the jury acquitted the defendant of this indictment.

And he was afterwards tried upon a third indictment for a *cheat*, in committing the acts aforesaid, and was found guilty; and fined and imprisoned till he paid the fine.

Coke *versus* Allen.

ERROR in *B. R.* upon a judgment given in the court of Common Pleas; and the error assigned was, for not filing a warrant of attorney, as required by the late $\dagger$ statute for the amendment of the law, by which it is enacted, *that the attorney for the plaintiff shall file his warrant the same term in which he declares, and the attorney for the defendant in the same term in which he appears*; but this was over-ruled; for if the plaintiff's attorney file the warrant at any time before the defendant hath pleaded, it is sufficient to maintain the judgment, though by the said statute he may be *fined* if he doth not file it in the term when he declares; but the not filing it in manner, as aforesaid, doth not impeach the judgment.

Warrant of attorney may be filed at any time before the defendant pleads.
 $\dagger$ 4 & 5 Ann. cap. 16.
S. P. accord. in Fitzgib. 191.
Stra. 526.
2 Stra. 807.

Spackman *versus* Husley.

THE plaintiff declared in the Marshal's court upon an *infirmul computasset infra jurisdictionem, &c.* and had judgment; and now upon a motion to set it aside, it was insisted, that the *account* doth not alter the duty, for that may arise in *York*; and no other consideration being laid to intitle the court to any jurisdiction, the judgment ought not to stand; but adjudged, that the *account* was sufficient to give the court a jurisdiction.

Infirmul computasset infra jurisdictionem, good.

* D E

* P. 78.

* D E

Term. Sanct. Trin.

Anno 9 Georgii, 1723.

Tucker *versus* Goldburne.

In debt upon
the assignment
of a bail-
bond, the
process on
which the ar-
rest was made
must be set
forth.

* Cro. Eliz.
647.
Sid. 159.
Saxby v. Kir-
kus, B. R.
Hil. 1754.

AN action of debt was brought upon an assignment of a bail-bond taken by the sheriff, who had arrested the defendant upon a *capias*, &c. and upon a demurrer to the declaration, it was objected, that the plaintiff had not set forth the *capias*, or the *teste* or *return* of any * *capias*, as he ought to have done; and the court of Common Pleas being of that opinion, a writ of error was brought in B. R. but the judgment of the Common Pleas was affirmed, for it is the *capias* which gives life to the bond.

Moor *versus* Thompson.

Where the
jury may sever
the damages
for which the
plaintiff hath
declared.

* P. 79.

IN an action of trespass brought by the plaintiff in the court of Common Pleas, for entering on his (the plaintiff's) land 25 March 4 Geo. with a *continuando* the said trespass the 25 March 6 Geo. (which was two years), &c. *ad damnum*, &c.

The defendant pleaded that the lands were copyhold, and the freehold of one Green. The plaintiff replied, and admitting them to be copyhold set forth a surrender made to him, and that he admitted a whole year before he brought this action of trespass, &c. viz. 7 Apr. 5 Geo. The defendant in his rejoinder denied the surrender; issue thereon. And at the trial there was a verdict for the plaintiff; and the jury gave damages for that year only, *a prædicto 7mo die Apr. 5 Geo.* whereas the plaintiff had declared for two years damages; and now upon * a writ of error brought, it was insisted, that though the plaintiff had a verdict, yet if the jury did not find enough, it is an insufficient finding, and here they had found damages only for one year, where the plaintiff had declared for two years damages, and the jury cannot sever the damages for which the plaintiff had declared.

Term. S. Trin. 9 Georgii, 1723.

“ Had the damages been assessed generally, it had not been good, Curia.
“ because upon the record it appears that the plaintiff ought to re-
“ cover no damages till 7 Apr. 5 Geo. because till then he hath no
“ title to the lands: if the damages had been assessed, they might
“ have been released.

Judgment affirmed.

Colebrook *versus* Diggs, Tuesday (a) 2 June.

(a) In Trin.
term 8 Geo.

ERROR in the *Exchequer-chamber* upon a judgment given in
B. R. for 1600 l. in an action of debt on bond conditioned for
payment of money only, and there the judgment was affirmed;
afterwards a writ of error was brought in the *house of peers*; and
the plaintiff in the original action being about to take out execution
against the defendant, for not entering bail according to the (b) sta-
tute.

Where the
defendant
must enter
into a new
recognisance
of bail.
Stra. 527.

(b) 3 Jac. c. 8.
perpetuated
by 3 Car. c. 4.
f. 4. See 16
& 17 Car. 2.
c. 8. perpe-
tuated by 22
& 23 Car. 2.
c. 4.

“ By *stat. 3 Jac. c. 8. sect. 1.* No execution shall be stayed by
“ any writ of error or *superfedeas* thereupon, in any action of debt
“ upon a single bond, or upon any obligation with condition for
“ payment of money only, or for rent, or upon any contract in the
“ courts of record at *Westminster*, or in the counties palatine, or in
“ the courts of great session; unless such person, in whose name
“ such writ of error is brought, with two sureties, such as the court
“ wherein the judgment is given shall allow of, shall first be bound
“ unto the party for whom judgment is given, by recognisance in
“ double the sum recovered, to prosecute the writ of error with
“ effect, and also to pay (if the judgment be affirmed) all debts,
“ damages and costs adjudged upon the former judgment, and all
“ costs and damages to be awarded for delay of execution.

Mr. Reeve: Now the defendant having already entered into such
a recognisance in B. R. before the writ of error was allowed, it was
insisted for him, that he is not obliged by this statute to give a new
recognisance of bail, having already pursued the statute by giving
bail in that court where the judgment was given, and it would be
very hard for him to be bound in two recognisances for one and the
same matter.

“ This case differs from the case in *Salk. 97. pl. 2.* for there the
“ original judgment was obtained in C. B. and bail given there on
“ removing the record into this court: and when a new writ of
“ error was brought on the judgment in this court, new bail was
“ given, because no recognisance was before entered into in this
“ court; for this court could take no notice of the recognisance
“ given in C. B. but if any new bail ought to be given, it ought to
“ be in the *Exchequer-chamber*, where the judgment is affirmed.

2 Ld. Raym.
840.
7 Mod. 120.

On the other side it was insisted, that this matter is so plain, that
it was never controverted, for upon a writ of error in parliament,

Econtra by
Whittaker
serjeant.

the plaintiff in error must alledge the judgment in *B. R.* to be erroneous, as well as the judgment in the *Exchequer-chamber*; for after an affirmance in the *Exchequer-chamber*, this court awards the execution; for that court remits the cause with the proceedings; and this writ is brought in delay of execution of the judgment; but the first recognisance doth not extend to the *costs sustained in the house of peers*, but only to the costs for delaying the execution by the first writ of error; so that if a new recognisance should not be given, the costs upon the writ of error in parliament, if the judgment should be affirmed, would be lost.

* P. 80. * It is true, the statute enacts, That *bail shall be given in the same court where the judgment was given*; but this is only explanatory, and intended that it should be given *where the judgment was of record*.

Curia. " We after an affirmance in the *Exchequer-chamber* award execution, which we ought not to delay without taking new security " for the damages and costs. This act is a remedial law, and is " to be extended by equity. It is considered as a judgment and " record in this court, after it is affirmed in the *Exchequer-chamber*, " for the writ of error returnable in parliament is always directed to " the chief justice of this court, and he carries up the record.

And there is no manner of inconveniency by entering into two recognisances; for both are the same in respect to the plaintiff in error, because by the late statute he hath a proper remedy, if the plaintiff in the original action take out execution for more than is due; but it would be very inconvenient for him to be delayed by a writ of error, and to have no sufficient security to make satisfaction for his loss.

* Luck's case, There is a * case where an executor was obliged to give bail in
Hob. 247. the *Chamberlain of London's court*, and likewise bail for the same thing in the *Spiritual court*, and so double bail; and this was warranted only by a particular custom in *London*, which is not to be favoured so much as a general statute made for the advancement of justice, so the party was ruled to put in † new bail in *B. R.* else execution awarded.

† Salk. 97.
pl. 2.
7 Mod. 120.
2 Ld. Raym.
840. S. P.

Wilkinson *versus* Matthews.

The plaintiff was taken upon an escape warrant after a day-rule.

UPON a motion to discharge the person taken upon an escape-warrant, *after he had obtained a day-rule*; it was ruled, that the defendant should shew cause on such a day; and afterwards upon that day he shewed for cause, that the taking upon this warrant was about eight of the clock in the morning, and long before the court was sat, so that the plaintiff could not have a day-rule at that time; but this was over-ruled, because in this case there shall be no fraction of a day; and the opinion of the late Chief Justice

Holt

Term. S. Trin. 9 Georgii, 1723.

Holt was now mentioned, (*viz.*) That where a person is taken upon an escape-warrant, * who had obtained a rule for that day, that the prosecutor shall be committed; and that it was sufficient if the party had delivered his name in writing to the clerk the night before the day he moved for a day-rule, as soon as the court should sit; but it appearing in the principal case, that the day-rule was obtained after the party was taken upon the escape-warrant, on purpose to avoid the commitment by virtue of that warrant; and that his name was not delivered to the clerk the night before, but sitting the court; it was ruled, that he should continue in custody. * P. 81.

“ See *Bradshaw's* case, where a rule was made on a constable
“ to shew cause, &c. for arresting one who had a ticket, and her
“ name was in the petition of the day; but the rule was never
“ drawn up.

The King *versus* Ackworth & al’.

UPON a motion for an *attachment* against the defendants upon an *affidavit* of their withdrawing a *witness* from giving evidence at the assises in a trial had there upon an information against certain smugglers; it was shewed for cause why an attachment should not go, (*viz.*) That the defendants had *affidavits* to disprove the charge made against them by the *affidavits* of the plaintiff; thereupon those *affidavits* were now read in court; and it was affirmed to be the constant practice, that though the *affidavits* produced by the plaintiff were very full as to the charge, yet if the person denied such charge by as plain and positive *affidavits*, in such case he should be discharged, and an attachment should not go; and that if such *affidavits* were not true, then the plaintiff had a proper remedy, which was by indicting them for perjury.

And because a man shall not be kept in custody, and deprived of his liberty by an attachment; therefore this is the only case where a negative oath shall be preferred to an affirmative; all which was agreed by the court, but that the present case differed; for the defendant did not by his *affidavit* plainly deny the fact with which he was charged.

Where a negative oath shall be preferred to an affirmative.

* D E

Term. Sanct. Mich.

Anno 9 Georgii, 1722.

The King *versus* Laver, *Wednesday* 31 Oct.

The defendant
was arraigned
of treason.

THE defendant *Christopher Laver* being committed to the Tower for high treason, in compassing the death of the King, and an indictment having been found against him at *Rumford* in *Essex*, before special commissioners of *oyer and terminer*, and being removed hither by *certiorari*, was afterwards brought up by *habeas corpus* to the bar; and being arraigned upon the indictment, *Hungerford* and *Kettleby*, who were assigned his counsel, moved that the irons might be struck off his legs, and instanced the cases of *Gordon*, *King* and others, where it had been so done before they pleaded; and argued that he was not obliged to plead till his fetters were taken off; *Cranbourn's case*, 3 *Inst.* 34, 35. *Mirror*, c. 5. s. 1. *Kel.* 10. and that it was the opinion of the late *Chief Justice Holt*, that it ought to be so done; that this person was the first *Tower prisoner* that ever had irons on his legs, and that there were no such instruments there till now brought from *Newgate*; and the prisoner himself moved, that the irons might be taken off before he pleaded, because lying in his cloaths all night, and other inconveniencies occasioned by those irons were so painful to him, that he being deprived of his rest, had not the free use of his reason; that he hoped to have a fair trial as allowed by the law, without any undue severities, and he complained of some ill usage as he was bringing to the hall.

Keilyng 10.

Moved that
his irons might
be taken off
before he
pleads to his
indictment.

To which it was answered by the court, that they could not take notice of such ill usage, because they did not know by whom it was done; and as for the irons to be taken from his legs, it is true, it was done in those cases cited by his counsel; but it was where the prisoners had pleaded to their several indictments, and were to be tried on the same day; and that it would be to no purpose to insist on this matter * for so little a time as the prisoner now had to stand at the bar; and as for taking them off in the *Tower*, the court would make no order, because if they did, it might be an excuse to his keeper, if he (the prisoner) should escape, therefore it

Term. S. Mich. 9 Georgii, 1722.

it must be left to his (the keeper's) discretion, how to use his prisoner, especially since he had already attempted to escape.

Then the court recommended it to his (the prisoner's) counsel, that if they had any exceptions to the indictment, they would now shew what those exceptions were; whereupon they made the exceptions following:

ff. Mispelling, false Latin, nonsense and surplusage, and that there were insignificant and insensible words in the *very commission*, by virtue whereof this indictment was found, as *plenius (a) veritat*, which words cannot be construed to any manner of sense.

Exception to the indictment and commission.

(a) The words are—Et per

quos vel per quem, cui vel quibus, quando, qualiter, & quomodo, & de aliis articulis & circumstantiis præmissa & eorum quodlibet, seu eorum aliquod vel aliqua, qualitercunque concernent. plenius veritat.

And first as to the *mispelling*, he (the prisoner) is called in the indictment *Christopherus*, with an *e*, when it should be with an *o*, as *Christophorus*. 1st Exception.

To which the court answered, that they did not know what his name was, and probably he might be baptised by that name; but if he was not, then it might be pleaded in abatement; and though the *lexicons* and *dictionaries* might warrant *Christophorus* to be the right name, yet the other might likewise be a name of baptism.

Then it was objected against the words in this indictment, (*viz.*) That he (the prisoner) *compassavit imaginatus fuit & intendebat ad sacram personam Domini Regis capiend, seiscind. & imprisonand*. Now here the conjunction copulative *et* should have joined the word *intendebat* to the same mood and tense, but instead thereof it is joined to verbs of the *præterperfect* tense, &c. therefore it is incongruous *Latin*, and improper in an indictment, and make it vitious; besides, the word *ad seiscind.* the King, is an insignificant word, not known in the law, or in any *Latin* author; and for these reasons this indictment ought to be quashed, and the rather, because all forms of indictments, especially in high treason, ought to be very certain. 2^d Exception. 3^d Exception. 7 Rep. 5.

To which it was answered and resolved, that as to the fault objected to the commission, by virtue whereof this indictment was taken, this court hath no power over it so as to quash the indictment; but though the objection is, that *plenius veritat.* cannot be construed to any manner of sense, yet by transposing the words it may be made good sense. To which it was answered.

“ They are in the recital of the commission in the caption of the indictment, and must refer to the former words *ad inquirend*.
“ They are inserted in the form of a commission published in a treatise allowed by all the Judges, called *A collection of all statutes relating to high treason, composed for the assistance of the justices in Scotland*. Though it was said *per Hungerford*, that
VOL. VIII. Z the

Term. S. Mich. 9 Georgii, 1722.

(a) The late Mr. J. Foster observes, that the little tract intituled, "The method of trial of commoners in cases of high treason," published in the year 1709. by order of the house of lords, directeth, "That the addition of dwelling-places, and professions of the jurors, be inserted in the copy of the pannel; but that the act (27 El. c. 7.) doth not require that exactness, and that the practice is otherwise." Fost. Disc. High Treason, chap. 3. p. 230. See Matthew's trial, 9 St. Tri. 680. N^o 42. so *quare* which is the book alluded to.

1st. Then as to the *mispelling* the prisoner's name, he may plead that matter in *abatement*, for he may be as well known * by the name of *Christoferus* as by the name of *Christofer*; and this objection deserves no other answer.

2. It is true, the verbs are not all in the same tense; but though they are not, and that the *præter tense* is coupled to the *præterperfect* tense, yet that is not material, and shall not make this indictment naught; either word is sufficient to charge the defendant with the intent of compassing: either overt act is sufficient.

3. And as to the words *ad seiscind*, it being only an overt proof of the design; it is well enough if any proof is made of an overt-act of the things laid in the indictment; besides it is not a word unknown in the law, for it is used every day in the court of Exchequer, where *seifire facias* are words in a writ sent to the sheriff, and he returns *seifiri feci*. *Seiscind*. is a proper word; but without it there is sufficient to charge Mr. Laver.

Misnomer
pleaded in
abatement.

The objections being over-ruled, he was demanded to plead; the prisoner pleaded misnomer in abatement, and his plea was received, read and filed, and afterwards he was sent back to the Tower, and ordered to be brought again to the bar on Saturday in *Cra. animarum*; and being accordingly brought up on that day, (*viz.*) 3 Novemb. the Attorney General demurred to the plea, and prayed that the prisoner might join in demurrer.

Demurrer to
it, and no
time given to
join in de-
murrer.

But his counsel desired time to reply, or to join in demurrer, and the rather, because in *Fitzbarris's* case four days were given by this court, which is some proof that it is the course of the court to allow time to plead in such cases; and thereupon the chief clerk of the crown-office being asked what was the custom of the court in this matter, he answered, that in *criminal cases* there were precedents, where; upon demurrer, time was given to join in demurrer, but never in *capital cases*.

Whereupon the counsel for the prisoner argued, that if time was given in *criminal cases*, a *fortiori* it should be allowed in *capital cases*.

But the King's counsel replied, that no instance could be given, where in *capital cases* a day had been allowed to join in demurrer, because the prisoner can do nothing else; therefore where he

pleads

pleads in abatement, he should always be prepared to maintain his plea.

As to *Fitzbarris's* case, it is rather an authority against the prisoner than for him, for that was a plea to the *jurisdiction of this court*, to which there was a demurrer, and *Fitzbarris* immediately joined in demurrer; it is true, in the present case, life is concerned, but not so immediately; and this plea is so frivolous that it scarce deserves an answer, it being only a pretended mistake of a letter in the prisoner's name of baptism, when there are uncontrollable authorities that it is spelt both ways; and notice was given of * this demurrer yesterday, and a copy thereof sent to each of his counsel, so that greater indulgence hath been shewed to him than formerly to *Fitzbarris*, or to the *Lord Preston*, who upon his trial at the *Old Baily*, before the Chief Justice *Holt*, for high treason, pleaded his patent of peerage, but was denied time to produce it. * P. 85.

This was admitted by the counsel for the prisoner; but the reason why time was denied to produce the patent was, because the *Lord Preston* pleaded, that it was dated at *St. Germans*; and it would have been a dishonour to the court to proceed in the examination of letters patents granted by the late *King James* after his abdication, because every act done by him afterwards as King was absolutely void.

Upon the whole matter the court held, that time was never yet given in *capital (a) cases* to join in demurrer, and said that what was now offered as a plea was first offered as an exception to the indictment, and that the prisoner's counsel were then ready to argue it as an *exception*, and why not now when it is a *plea*; it is true, they have mentioned *Fitzbarris's* case as an instance, where four days were allowed by this court for him to join in demurrer; but that is so far from being a case in point, that it widely differs from the present case; for there the cause of delay and contest was between the prerogative of the King and the privilege of the house of commons, which were extraordinary things, and to be well considered before *Fitzbarris* could be tried; now in the present case the prisoner cannot withdraw his plea, without leave of the Attorney General, who having demurred to it, the prisoner hath nothing more to do than to join in demurrer, and all the proceedings in such cases are *instanter*. (a) In capital cases no rule is given either to plead or join in demurrer; but the prisoner being at the bar is obliged to answer immediately; for all the proceedings are *instanter*; which differs from other criminal cases not capital.

The prisoner answered, that he did not affect any unreasonable delays, but that he was willing to withdraw his plea in abatement, and to plead *in chief*, though he had a joinder in demurrer ready engrossed; and he did accordingly withdraw it, and pleaded by the name in the indictment, *Christopherus*. But he moved for a rule, that his wife and sister might be permitted to visit him under such restrictions which the court should think fit; and a rule being about to be made, that his wife might come to him, being first searched; but as to his sister, that it should be left to the discretion of the keeper; Rule made for his friends and relations to visit him.

It

Term. S. Mich. 9 Georgii, 1722.

It was objected against this rule by the counsel for the King, that the like had never been made; it was denied to *Fitzharris*, and only an intimation given to the keeper, that it might be expedient for his friends and relations to visit him.

* P. 86. * But the Chief Justice said, that it was true, the wife of *Fitzharris* was denied to come to her husband, probably because she had misbehaved herself by throwing his plea into the court when it was not signed; and it was now affirmed, that there had been rules made by this court of the like nature; but if there had not, yet it was in the power of the court to make a rule to oblige the keeper to permit the prisoner's friends to come to him under proper restrictions; and a rule was made accordingly for his wife to be admitted, in the presence of the gaoler, and after being searched.

15 Nov. *Pengelly* King's serjeant moved the court to appoint a time for the trial. The process must be returnable at a common day, the indictment being removed by *certiorari*, the last return in this term but one is in eight days of Saint Martin; and then the trial may be the *quarto die post*, which will be the 21 Nov.

The prisoner desired a further day, which, by the court, cannot be, for the jury cannot be adjourned beyond the return.

" Then the prisoner moved, (notice having been given) for a "
" *subpœna ad testificandum* to be directed to his witnesses, and for "
" an *habeas corpus ad testificandum* to bring up Lord Orrery, and "
" Lord North and Grey, who were then prisoners in the Tower for "
" high treason.

Fortesc. Rep. 396. " *Per Cur.* Such writs have formerly been granted of course at a "
" Judge's chambers; but the inconvenience may be so great, that "
" an affidavit ought to be first produced, that they are material "
" witnesses: otherwise, at such a trial, under such a pretence, "
" there may be a general gaol-delivery of all prisons in the king- "
" dom.

" But the next day, without any affidavit, the Attorney General "
" (Sir Philip Yorke) consented to such writs.

Fortesc. Rep. 396. " However a general rule was made by the court, that no *habeas* "
" *corpus* of either side, civil or crown, should be granted hereafter "
" without affidavit, that the parties to be *subpœna'd* were material "
" witnesses, and bad the officers take it down; and the court de- "
" clared that they might, on the circumstances of the case, refuse "
" to grant such writ of *habeas corpus*.

The prisoner likewise moved for a rule, that he might have copies of all the papers in the keeping of the secretary of state, which were intended to be produced in evidence against him.

To which it was answered, that it was time enough for such a motion; so he was remanded to the Tower, and his trial ordered to be on Wednesday the 21st of November.

The panel was called over. At which day he being brought to the bar and tried, his irons being first taken off, the jury were called by the clerk of the crown-office,

Term. S. Mich. 9 Georgii, 1722.

office, and he was desired to except against as many as he thought fit, so far as the law allowed; thereupon he moved, that the panel might be called over, that he might know who appeared, and who not, which, after some opposition, was done.

Then the clerk called over the (a) panel, and the prisoner challenged 34 *peremptorily*, and two more *principally*, for saying in *Essex*, that they hoped to see him hanged; and he challenged four more for want of sufficient freehold within the county, within the meaning of the statute (b) 7 Will. by which it is enacted, that they must have 10 l. *per annum*; which challenges were allowed. But *per cur.* being servant to the King, or farming any thing under the King, is no cause of challenge.

Challenged

36.

(a) Cur. granted that the whole panel be first called over, before the prisoner be obliged to challenge any.

(b) 7 & 8 W.

3. cap. 32. See 4 & 5 W. 3. cap. 24.

Then the Attorney General challenged eight for the King, but is not by law obliged to shew any cause of such challenge before they had gone through the panel, and the jurymen not challenged are sworn, (*v.* 33 E. 1.) for if those who appeared were not enough to make up a jury, then those eight might be sworn.

Challenge for the King, not shewing any cause.

But the jury being full without them, and now sworn, the first witness produced against the prisoner was one (c) *Stephen Lynch*, who deposed that he and the prisoner did often consult together,

Stephen Lynch.

and propose methods how to seize the *Tower*, and the *Lord Cadogan*, the *Lord Townshend*, and *Mr. (d) Walpole*, and the *Bank of England*, and to give the arms in * the *Tower* to the prisoners, and others in the *Mint*, and to the mob, and likewise to seize the *King* and the *Prince*; and that on the 24th day of *August* last, the prisoner did read a declaration, and gave it to him (this witness) to read at the sign of the *Green-man in (e) Layton-stone in Essex*, which was to be sent all over *England*, as soon as they had seized the city of *London*; that he (this witness) was the person appointed to seize the *Lord Cadogan*, and that he was to have as many men as he should choose for that enterprise; and that accordingly he (this witness) and the prisoner went to view that Lord's house, to whom the prisoner pretended, that he had an authority to sell an estate, &c. and farther he deposed, that he got ten guineas of the prisoner to defray his charges until they could put their designs in execution; which was to be done as soon as the soldiers, who were then encamped in *Hyde-Park*, should break up.

(c) Per cur. It is not proper to ask a witness on a *voire dire*, whether he hath a promise of pardon for giving evidence: but he must be sworn, it going only to his credit.

* P. 87.

(d) Now Sir Robert Walpole.

(e) This was the overt-act laid in *Essex*.

That these consultations were carried on between the prisoner and this witness for a whole month; yet the prisoner never told him who was to be the general officer, though he went with him to the *Lord North* and *Grey's* house, but not a word spoken there of their scheme, where this witness was introduced by the prisoner, and received very kindly.

Term. S. Mich. 9 Georgii, 1722.

Serjeant
Plunkett.

The next witness produced against the prisoner was a soldier, (*viz.*) *serjeant Plunkett*, who deposed, that in *July* last, he met the prisoner in *Lincolns-Inn Fields*, who there told him of this scheme, which was then in agitation to bring in the *Pretender*, and if he (this witness) could procure some soldiers who were then disbanded, to list themselves in the *Pretender's* service, then they should be able to regulate the mob upon any insurrection, and told him, that the *Lord N. and G.* was to be their general; and that he would head the insurrection, and that the prisoner then gave him (this witness) half a crown, and promised to send him more money to list men; that afterwards he received half a guinea of one *Jefferies* a non-juring parson, who told him (this witness) that *Mr. Layer* was in the country, and had sent that money to him; that in a little time afterwards he had a letter left at his lodging by the said parson, that *Mr. Layer* was come to town; and thereupon this witness went to him at the *Castle-tavern in Drury-lane*, where he the said *Layer* told him, that he had sent a whole guinea by the parson, and wondered that he had received but half, and no more, and then he the prisoner told this witness the whole design; and

* P. 88. that some of the greatest * men in the kingdom would come into the scheme; and though he (this witness) acknowledged that he could neither write or read, yet he remembered the contents of the letter which he had received three months since, and which one of his comrades did read to him.

Mrs. Mason.

The next witness was *Mrs. Mason*, who deposed that the prisoner left a bundle of papers with her for safe custody, which was sealed with an *head*; that the bundle so left with her was not opened till the messenger seized it at her lodging; and that the bundle now produced in court is the same which was left with her by the prisoner, she having marked it in a particular manner; and the messenger deposed that it is the same bundle he seized at her lodging.

Messengers.

Then the messengers who apprehended the prisoner, deposed that there were 2 fuzees, 2 cases of pistols, 2 swords, 2 muskets, and about 40 or 50 cartages of powder and bullets in his the prisoner's house, made ready for any enterprise; and one *Colonel Huske* deposed, that the fuzees had such wide bores, that they would swallow a musket-ball, and serve very well for that purpose.

Mr. Squire.

Then *Mr. Squire* the messenger, and others, made oath of the manner of the prisoner's escape from him out of his (the messenger's) house, and of his being retaken in *Saint George's Fields in Southwark*.

Mrs. Mason.

Mrs. Mason farther deposed, that she had received several letters by the order of the prisoner, which were directed to one *Mr. Fountaine*, which letters were delivered by her to the prisoner, and opened and read by him; and she being now asked whether she could read, she replied she could not, but that her landlady told her to whom those letters were directed.

Then

Term. S. Mich. 9 Georgii, 1722.

Then one *Mr. D'Oyley* deposed, that some papers which were in that bundle were as he believed of the prisoner's hand-writing; for that he this witness was acquainted with his hand, he being his clerk about fourteen years since, and that he had received a letter from the prisoner about five years past, which he believed was written by him. Mr. D'Oyley.

Then the papers were produced to be read, which was opposed by the counsel for the prisoner, because similitude of hands was no evidence, and some cases were cited to prove that matter.

But this was over-ruled by the court, *who were of opinion, that if these papers were not written by the prisoner, yet being found in his custody, they ought to be read; and so it was resolved in the Lord Preston's case.* Paper is found in his custody, tho' not written by him, may be read. 6 St. Tri. 279. Fost. Rep. 198. Bur. Rep. 644. S. P. * P. 89.

* Then the papers were delivered to the clerk of the crown, and he read a scheme consisting of fourteen articles, how to surprize the *Tower*, how to provide arms, where to rendezvous, and several other articles, &c. then he read ten notes signed by the *Pretender* himself *Ja. Rex*, and those were to raise money for this undertaking.

Then several letters were read, all written by *Sir William Ellis* who is secretary to the *Pretender*, and subscribed *Eustace Jones*, and directed to *Mr. Fountaine*, which letters were deciphered by some other papers found in this bundle, (*viz.*) That paragraph to provide able workmen, was explained to provide able soldiers, and that paragraph, (*viz.*) The ablest hands of *Barbara Smith*, was explained The army, that *Eustace Jones*, is *Sir William Ellis*, and *Mr. Atkins* is the *Pretender*, that *Mr. Burford* is the *Earl of Or—y*, and *Mr. Simonds* is the *Lord N. and G—y*.

Then *Mr. Stanian* and *Mr. Delebay*, who were present when the prisoner was examined before the council at the *Cockpit*, offered to give evidence of the prisoner's confession there; but this was opposed by his counsel, for that he had not signed any confession, and probably some unguarded words might drop from him at that time, which might amount to a crime, if given in evidence. Mr. Stanian. No confession signed.

Thereupon the court declared, That it was no evidence, but that the witnesses should be examined as to what he confessed there as a corroborating circumstance of the evidence already given; so those witnesses being sworn, deposed that the prisoner confessed he had been at *Rome*, and that he was kindly received at the *Pretender's* court, and that he prayed to have credentials to his friends in *England*, which was denied; but that he obtained leave that he (the *Pretender*) and his spouse would stand godfather and godmother to his (the prisoner's) child; and that after he returned into *England*, he applied himself to the *Earl of Or—y* to stand proxy for the *Pretender*, which he refused; then he made application to the *Lord N— and G—y* who with the late *Dutchess of Or—d* stood proxies.

Term. S. Mich. 9 Georgii, 1722.

They farther deposed, That being asked *what he knew of the Pretender's declaration*, he answered he only knew some heads of it; then a woman was produced, who deposed she saw the prisoner at Rome in July last was twelvemonth, and that he was kindly received at the Pretender's court.

* P. 90.

The prisoner's
defence.

* This being the substance of the evidence against the prisoner, he now made his defence; and first the Lord North and Grey said, that he never saw Stephen Lynch, but only when he came to his house with the now prisoner, where he staid one night, and no longer, and that he found by his discourse, he the said Lynch was a scandalous fellow, and coming afterwards to his house when the prisoner was taken, he was forbid to come in.

There were several other witnesses who gave an infamous character of Lynch, Plunkett and Mason, (*viz.*) That they would say and swear any thing, and that they would hang a man for *two-pence*, and two of the witnesses for the prisoner swore positively, that Lynch told them that he had got some money from the bastard-daughter of one of the first men in England; another witness deposed, that Lynch told him, that he was unfortunately brought in to impeach the prisoner, and that he had rather fight any six men in London than do it; but that being engaged in it, he must go through, and that he had nothing to say against any person but against the prisoner, and nothing against him but *talk*; and another witness deposed, that Plunkett told her that the money he received of the prisoner was rather for *charity*, than for any service done to him formerly, and that he (Plunkett) could hardly make the prisoner remember their former acquaintaintance.

Then two witnesses were produced, who deposed that the papers which were sworn by Mr. D'Oyley to be the prisoner's hand-writing were not so; then Mr. Paxton produced a paper found in the bundle, which the prisoner's witnesses owned to be his hand-writing, and this was compared with the other papers which they had sworn not to be of his hand-writing; whereupon the prisoner observed to the jury, that similitude of hands was a very weak evidence, and said if such evidence, and such witnesses should be allowed, it was impossible for any man to be safe.

Sir Philip
Yorke.

Then the Solicitor General replied, setting forth the greatness of the offence, and the plainness of the proof, and made several remarks on the evidence on both sides, and said that the indictment was proved beyond contradiction; and that the witnesses produced to give a character of Lynch, &c. wanted witnesses to their own characters, and that one of them, (*viz.* James Darcy) had sworn he knew the prisoner * here last winter, when he did not come into England till last April.

* P. 91.

Then the witnesses seemed to be people raked out of the Mint for a certain purpose, but that the witnesses for the King were persons of credit, and to prove them so, several credible persons were called;

called; the first was a *vintner*, who deposed that he had known *Lynch* about four months, in all which time he was frequently at his (the *vintner's*) house, and had behaved himself very honestly; and being asked whether *Lynch* owed him any money, he replied, that he did, (*viz.*) 8*l.* 15*s.* 6*d.*) which he paid not long since; there were likewise several officers called to *Plunket's* character.

Then the Chief Justice summed up the evidence on both sides, Curia. and concluded with directing the jury, that if they did believe there was an overt-act of treason in the county of *Essex*, and that it was proved by *Lynch*, and confirmed by the confession of the prisoner; and if there was any overt-act in another (a) county, as his lifting or employing any to lift or engage men in the Pretender's service, then they should find the prisoner guilty; and they being gone from the bar, returned in the space of half an hour, and brought in their verdict Guilty.

The prisoner was then remanded to the *Tower*, and ordered to be The verdict. brought again to the bar on the *Tuesday* following, being the 27th day of *November*, which was done; and then his counsel moved again that his irons might be struck off, which, not being opposed, was likewise done; and the court directed, that if they had any thing to offer in arrest of judgment, this was the proper time, and they should be heard.

Thereupon they moved that the *venire facias* for summoning the jury might be read, which was opposed by the King's counsel as a thing without precedent; therefore, if it should be now allowed, it might be a precedent hereafter; not that they feared to have it read, but would not make a precedent to give the courts any trouble both now and hereafter; and the rather, because what was now desired did not concern the merits of the cause, but was a collateral point, and of no great weight.

And the court said they would not deny the prisoner any thing to which he was entitled by law, and which might do him any service in his present circumstances; but that if what was now (b) desired was never yet granted to the greatest persons under the like misfortunes, there could be no reason to grant it to him. The *venire facias* not allowed to be read.

* It is true, the indictment is a thing on which the merits of the cause depend, and therefore the court admitted it to be read to the prisoner, but not the *venire facias*, for that was never yet allowed. * P. 92.

(a) On an indictment for high treason conspiring the death of the King, if several overt-acts are laid, and some are proved by one witness to be done in the county where the party is indicted; and others are proved by another witness to have been committed in a different county, that evidence is sufficient to maintain the indictment; they are two witnesses of the same species of treason within the meaning of the law. *Kelyog's trial. Five juries trial.*

(b) The prisoner, at Common Law, was not intitled to demand any thing to be read but the indictment, and 7 *W. 3. c. 3.* hath made no alteration as to the process. See *Foss. Cr. Law* 221.

Term. S. Mich. 9 Georgii, 1722.

The objection to it.

33 H. 6. 45.
5, 6, 35, 36.

Rookwood's case.

Yelv. 204.

Cro. Jac. 257.

284, 357.

Roll. Abr.

822. pl. 4. 6.

Dalt. J. 415.

2 Inst. 125.

Bro. Nisi

Prisus 32.

The objection to it, if it had been read, was, that it is returnable *in eight days of St. Martin*, and the prisoner not being tried on that day, in such case, if it is not continued to the day of trial, they are out of court, and so this jury had no more authority to try the prisoner than those who were never returned on the panel, because the *discontinuance* makes the trial erroneous, for where-ever there is a *discontinuance* of any return, the whole proceedings are wrong.

Then the court asked the clerk of the crown how the practice was in such cases; who answered, that it was as in the present case, and that he never saw a *venire facias continued*, because the jury are always supposed to be in court till the four days are past; and there never was any continuance within the four days.

To which it was answered by the counsel for the prisoner, that it might be so in *civil* or *criminal* cases, but not in *capital* causes, because in such the law requires the utmost certainty.

"*Cur. contra.* There is a day of appearance on the *ven. fac.* and the proceedings are like those on an original.

"In case the jury do not appear on the *ven. fac.* so that a *istringas* is awarded, it always bears *teste* the *quarto die post*, after the return of the *ven. fac.* The jury is never bound to appear till the *quarto die post*; they may adjourn the jury over to any day before the next return in the term: but no entry is ever made on record of such adjournment, for the proceedings are entered to be at the return of the writ; the case of *Rookwood* is so, for on a commission of *oyer and terminer*, there is no *quarto die post*, nor day of appearance, but the day of the return of the writ. And the court was of opinion, that if this was a good objection, then many proceedings in the like cases would be set aside.

Then the prisoner observed, that all the proof against him at the trial was a *design* to levy war; but that it never was actually levied, and that a design or (a) intention to levy war was not treason; it is true, an intention to kill the King is treason, if proved by some overt-act; and here the indictment is for a design to kill the King; and the overt-act which they would apply to it, is a design to levy war, which he said was not an overt-act of his design to kill the King.

But the court was not of that opinion, this very point being settled above 100 times ever since the case of the Regicides, so late as *The King versus Gordon & al*, 1 Geo. and ought not to be permitted to be disputed, where an intention to levy war was adjudged to be an overt-act of a design to kill the King.

To which it was answered by the counsel for the prisoner, that in *Francia's* case it was only argued, Whether an *intention to levy war* should be given in evidence as an overt-act of an intention to kill the King, which is not the present case, because now that very matter is moved in *arrest of judgment*, where all the stress must be

Intention to levy war is an overt-act of a design to kill the King.

(a) A consultation to levy war is no overt-act of high treason laid in the indictment, viz. compassing and imagining the death of the King.

be laid upon it that possibly may be laid; which was not requisite in *Francia's* case, because he was acquitted; but this objection was over-ruled.

The next thing in arrest of judgment was, that the *overt-act* in *Essex* was not well laid in this indictment, for it was, that he (the prisoner) *malitiose & proditorie publicavit quoddam scriptum, &c. continent. & purportant. (inter alia)* an exhortation, incitement and promises of rewards, &c. When the very * words, and not * the *purport* of them, ought to be laid in the indictment; as it was resolved in Doctor *Sacheverel's* case, that in all accusations, the words supposed to be criminal, ought to be inserted. *Co. Lit.* 303. a.

Overt act where well laid.

P. 93.

“ *Cur. contra.* The words themselves need not be set out, it is sufficient to shew the substance or effect of them. And by *Eyre* Justice, the opinion of the Judges in Dr. *Sacheverel's* case was a great surprize to *Westminster-hall*, being never so adjudged in any book. And *Holt* Ch. Just. held, that an indictment specifying the words or the substance was good. *Haley's* case, *M. 30 C. 2.* “ *B. R. Rex v. Gripe, Trin. 8 W. 3.* so that opinion to me seems wrong, being without any foundation. And it was adjudged “ *per cur.* That if but one overt-act is well laid, judgment must pass against the defendant; so held in *Rookwood's* case, *Fost. Cr. Law 245.*

Ld. Raym. 256.
Com. Rep. 43. pl. 2.
12 Mod. 139.
5 Mod. 343.
2 Salk. 513.
Comb. 459.
Carth. 421.

Purport.

But the counsel for the King argued, that in *capital* cases it is sufficient to lay the *purport* of the words in the indictment; and that it was the opinion of the late *Chief Justice Holt*, that in all cases for scandalous words, it was the safest way to lay the *purport* of them in the action, because then the special matter might be given in evidence.

It is true, in *criminal* cases, the very words ought to be laid in the indictment, but not in *capital* cases; for suppose a man should get upon *Charing-cross* and read a declaration for the Pretender, this would be treason, though the very words could not be laid in the indictment; all which was admitted by the counsel for the prisoner, because the proclaiming the Pretender would be high treason; but in the present case, the prisoner only gave a paper to *Lynch* to read, which is not a publication of that paper.

This paper is a scandalous and treasonable libel, which the counsel for the prisoner at his trial called a *ballad*, and that it would amount to no higher a crime than to the publishing a *libel*, for which they ought to have been reprov'd at that time; but it was pass'd over, because it should not be said, but that they had all manner of indulgence; and now being asked, Whether they had any thing more to say in arrest; they replied they had not.

Curia.

Then the prisoner said he had several accounts to make up with several persons, and particularly with the Lord *Londonderry*, and that he hoped he might have a little time allowed for that purpose,

pose, because he would do justice to all men; and that he had a greater account to give to his maker, and hoped that he might have some reasonable time allowed in that respect; and then if the King was not pleased to continue his life, he would convince the world that he dared to die like a gentleman, and a christian, and to appear before that just judicature, where he hoped to have a double portion of that justice which had been denied to him here.

* P. 94. Then the *Chief Justice* gave sentence thus, (*viz.*) *Christopher Layer*, you are convicted of high treason, and on a very plain proof; you had counsel of your own choosing, and a jury of your own admitting, for you excepted against 34 only; the facts which were proved against you were, your frequent corresponding with the Pretender, and a treasonable scheme of your own hand-writing; your confession before the counsel shews, that the *Tower of London* was to be seized, and also the *Bank of England*, the general of the army, * and other the King's friends, and likewise his royal person, and all the royal family, and that a declaration was to be sent to alarm all parts of the kingdom; and all this was to be done to a King who never offered the least wrong to any of his subjects, but who takes all possible care to maintain the laws, and to preserve the rights and liberties of the people, which laws he makes the measure of his government; and that you have endeavoured to set a *popish Pretender* on the throne, who would introduce despotic and arbitrary power, and all this done by you who are a professor of the law, and who could not be a stranger to the happiness of our present constitution.

The judgment.

But now you stand for judgment, which is, That you be carried from hence to the place from whence you came, and from thence you shall be drawn to the place of execution, and there to hang, but not till you are dead, but to be cut down alive, and your entrails cut out, and burnt before you, and your head to be cut off, and your body divided into quarters, and both your head and quarters to be disposed as his Majesty shall think fit.

Then the prisoner desired, that his wife and sister might have leave to come to him, and that *Mr. Morgan* and *Mr. Jones*, two clergymen, might be admitted to him; but *Mr. Jones* not being in town, he chose another, and had a rule for that purpose.

Executed in one county tho' the fact was done in another.

But on *Wednesday 28 Novemb.* the Attorney and Solicitor General moved for a rule for his execution, and that the court would appoint a time and place for that purpose; and said, that the chief design of executing such criminals was to be an example to others not to offend in the like manner, and to deter them from committing treason, and therefore they moved that the execution might be in *Middlesex*, especially since overt-acts were proved in *Middlesex*, though the fact was done in *Essex*, and said, that there were many precedents for executing criminals in such places as this court should think proper; and that the reason was stronger in case of high treason.

treason than it would be for felony, because the King hath a greater property by the judgment, in the body of a traitor, than of a felon, he having power to dispose of the four quarters as he pleases.

Cur. It seems reasonable, for all punishments are intended for example; and the greater example an execution must be, where there is the greatest concourse of people.

The court asked the clerk of the crown if he knew any such precedents, who replied, that Doctor *Lopez*, convicted of treason in Queen *Elizabeth's* time in *Berkshire*, was executed in *Devon*; so the Lord *Audley*, in *Charles the First's* time, was executed in *Middlesex* for a fact committed in *Wiltshire*; so *Dale* in King *James the Second's* time, was convicted of a felony in *Berkshire*, but executed in *Devon*. Two other late precedents were mentioned; and that it was daily experience, for a person convicted of perjury in *Middlesex*, to stand in the pillory at the *Royal Exchange*.

So a rule was made to the *Lieutenant of the Tower*, to deliver the prisoner to the sheriffs of *London and Middlesex*; and another rule to the said sheriffs to execute him on *Wednesday December the 12th*, at *Tyburn*.

Then the King's counsel moved the court to alter the rule made the day before, for Mr. *Morgan*, the clergyman, * to attend the * P. 95. prisoner, for that he was taken into custody upon suspicion of treason; and had given bond to appear in court this day.

The court answered, that any clergyman should be admitted to the prisoner who was a person of known honesty, integrity and learning, but not such who might harden him in his iniquity in his last moments; so two more clergymen were joined in the rule.

" Afterwards, and on the very day before he was to be executed, Reprieve.
" he had a reprieve by his Majesty's warrant, and so continued to 2 Kel. 77.
" be reprieved till *Friday 8 Feb.* when the attorney general moved pl. 39.
" for a rule to be made on the lieutenant of the *Tower* to bring up
" Mr. *Layer*, to know what he could say *quare executionem non*,
" &c. there being some (a) opinions that he could not be executed (a) Holt Ch.
" by virtue of any warrant signed by the King; but that a new rule Just. cited
" must be made in the court of *King's Bench* for his execution. Knightley's
case, who was
indicted for

high treason in conspiring the assassination of King *William the Third*, and being arraigned at the bar in the *King's Bench*, confessed the indictment, and judgment of death was pronounced against him in *Easter term*, and execution was countermanded, so that *Trinity term* passed, and then in the long vacation they had a design to execute it; and upon that all the Judges of *England* met, to consider what could be done; and it was resolved by all, that in regard a term had intervened without execution done, it could not be awarded without bringing *Knightley* to the bar; and *Holt Ch. Just.* said, that it would have been the same thing, if *Trinity term* had not been passed, but only begun; so that *Knightley* was imprisoned until *Mich. term*, and in the mean time he obtained a pardon. *Ld. Raym.* 482, 483. Doctor *Hensley* was convicted at the bar of the court of *B. R.* of high treason, in adhering to, aiding and corresponding with the King's enemies. *Trin. 31 G. 2. Bar. Rep.* 643. He was ordered for execution upon *Wednesday 12 July*, *Trin. vacation 1758. Bar. Rep.* 651. The prisoner being reprieved by the King before the day of execution, the better opinion was, that he could not be executed without a new rule of court of *B. R.* but in the mean time he obtained his pardon, which he pleaded in *B. R.* in *Mich. term 1758.*

Term. S. Mich. 9 Georgii, 1722.

“ The prisoner being accordingly brought up on *Monday 11 Feb.*
“ and having nothing to say in bar of execution, Mr. Attorney
“ General desired a rule might be made for awarding proper writs
“ for his execution on *Wednesday 27 March*, which was accord-
“ ingly granted, before which day he was further reprieved to the
“ *third day of May*; and afterwards another rule was made to
“ execute him on the *17th day* of the said month of *May*, which
“ was done accordingly at *Tyburn*.

The King *versus* Seymour Richmond.

Attachment
against an of-
ficer of an
inferior court
for oppression.

AN attachment was granted last term against the defendant *Richmond, nisi causa, &c.* for that he being town-clerk of *Wallingford*, had attached so much meal in the market there in sacks, and had sold the same under colour of the said attachment, when the owner would have given an appearance to the suit for which his goods were thus attached; and upon complaint made by the said owner to the mayor and burgessees there, he the said defendant was ordered to deliver the meal to the owner, upon giving an appearance as aforesaid; but the defendant refused to deliver the meal, and said, that the owner should never have his meal again.

And now he shewed this cause why an attachment should not go against him, (*viz.*) He made an *affidavit*, that he was town-clerk of that borough, and that when he made out the order to attach the meal, he thought it a good order; and that if the mayor and burgessees made any order for the defendant to deliver the meal to the owner, such order was only verbal, and not in writing, and that a verbal order could not supersede one in writing, and that if he
* P. 96. had offered any contempt to such verbal order, he ought to be * punished there, where the supposed offence was done, and not by attachment.

To which it was answered, that where an officer of an inferior court abuseth the process of that court, to the oppression of any person, he may be punished by this court; and that the defendant having issued out an attachment as the very first process, it is altogether irregular; and then afterwards to make use of it as an execution, is still worse, and an apparent oppression; and having sold the meal by virtue of that attachment, contrary to the express order of the mayor, and his declaring that the owner should never have it again, shews he had a design to oppress him.

It is true, he swears that he had only a verbal order to deliver the meal; but yet that can be no excuse to him, because he is the very person (being the town-clerk) who should have entered that order in writing.

Term. S. Mich. 9 Georgii, 1722.

The rule is for an attachment *nisi causa*, &c. and the ground of Curia. that rule is for oppressing a stranger, and if this is not denied, (as it is not by the *affidavit*) then the defendant is guilty of this oppression; so the rule was made absolute.

The King *versus* The Earl of Orrery, Lord North and Gray, Bishop of Rochester, Kelley and Cockran, prisoners (a) in the Tower.

(a) They were committed by the secretary of state for high treason.

BY the *babeas corpus* (b) act, it is provided, that persons committed for treason or felony *specially expressed in the warrant*, shall upon prayer in open court, in the first week of the next term, be brought to their trial, and if not indicted the next term, then upon motion on the last day of that term they shall be bailed, unless it appear on oath, that the King's witnesses are not ready; and if on such prayer they are not indicted or tried the second term after commitment, they shall be discharged; and the Judges refusing to grant an *babeas corpus*, shall forfeit 500 l. and the officer refusing to obey it 100 l.

(b) 31 Car. 2. cap. 2. f. 7. Habeas corpus act suspended. Fortesc. Rep. 101.

This act was now by another (c) act of parliament suspended for a time, and one Kelly a prisoner in the Tower for high treason moved for leave to enter his prayer pursuant to the *babeas corpus* act, and the same motion was made in behalf of the Lord Orrery and the Lord North and Grey; and the case of *Bernardi* was mentioned to shew that this was a reasonable motion, because they might be intitled to the benefit of the act, if it should ever be revived; for *Bernardi* was held to be out of the act, because he did not enter his prayer the first * week of the term after his commitment, apprehending that he was not obliged to do it, because the act was then suspended as it is now. * P. 97.

(c) 9 Geo. c. 1. f. 1.

“ And it was adjudged in the Earl of (d) *Ailsbury*'s case, that a person lapsing the first term after commitment can never after take benefit of that act; for it is in nature of a condition precedent required of them to make such prayer: and for this omission the Earl was adjudged precluded by the statute, though he was afterwards bailed by virtue of the discretionary power in the court.

(d) Salk. 103. 3 Vin. Abr. 518, 521.

“ Application must be made to that court which has power of trial: for which reason in *Leason*'s case, who was committed to *Surry* gaol for felony, and moved this court to enter his prayer, the motion was rejected; this court not being the proper court for the trial of prisoners in *Surry* gaol, the consequence of admitting such prayers would be to bring all felons, burglars, and other criminals to be tried in this court.

12 Mod. 66, 117. Comb. 421.

The like motion was made in behalf of the Bishop of Rochester, and it was farther urged by his counsel, that the *babeas corpus* act was

Show. Rep. 190. S. P.

was not suspended, because the words of the act of suspension were, *That no judge or justices shall bail or try, &c. without order from his Majesty's privy council, signed by six privy counsellors*; and this court is not (a) restrained by these words *judges or justices*, for the power and jurisdiction thereof cannot be taken away but by plain and positive words expressing the same; and it was said, * that notwithstanding this act of suspension, the *Lord Chancellor* for the time being might bail such prisoners, for he was not restrained by these words *judge or justice, &c.*

(a) It was expressly adjudged to be within the act, a little afterwards in this term. *The King v. the Bishop of Rochester.* * 4 Inst. 71. Salk. 103.

That this court by its original jurisdiction is invested with an ordinary and extraordinary power, which cannot be taken away by implication in any statute; it hath likewise a compulsory power by virtue of the *habeas corpus* act, which commands this court to bail persons, &c. which power still subsists, notwithstanding the suspension; for these words, *no judge or justice shall bail or try*, shall not include so high a judicature as this court; and this is agreeable to the usual construction of other acts of parliament; therefore that statute which deprives a man of his liberty shall not have so favourable a construction as other acts of parliament.

(b) Salk. 103. Comb. 421. 12 Mod. 66, 117.

And to induce the court to be of this opinion, some late cases were mentioned where persons were bailed during former suspensions of this act, (*viz.*) *The Lord (b) Aylesbury, (c) Fitzpatrick, and Sir William (d) Windham.*

(c) 2 Salk. 103. (d) Stra. 2. 3 Vin. Abr. 515. pl. 7.

Besides, there is sufficient matter to satisfy the words of the suspending act without extending them to the jurisdiction of this court; and that is by restraining the justices of *oyer and terminer*, and *gaol-delivery*, and justices of *nisi prius* from bailing or trying any man committed for treason, so that it shall not by any construction relate to this court.

Econtra.

(e) But it was adjudged in the case of *The King v. Bernardi & al.* Mich. 1 Geo. B. R. that the first term after * P. 98. the expiration of a suspension act, is the first term after commitment within stat. 31 Car. 2. c.

Pengelly serjeant *pro Rege*, argued, that if this court admits the prayer, he feared the consequence would be that they must be (e) bailed; that if this motion should be granted by the discretionary power of this court, then some extraordinary circumstance ought to be shewed to induce the court to grant it, in a case of high treason; but there is no pretence to such matter, they only rely upon the words in the act itself, as not restraining this court to bail persons; the words being, *that no judge or justice, &c. shall bail, &c.* which words (as they would have them) do * not extend to this court; but certainly this must be a mistake, because before the act of suspension was made, no judge or justice could bail for high treason; therefore those words must relate to this court, which is composed of judges.

2 (commonly called the *Habeas corpus* act) for that is the first term the prisoner is enabled to make his prayer, and then he has a right to make it. See *Stra.* 143.

The power of the court of B. R. is restrained.

Now if this court is not restrained, the act of suspension will be illuded, for some judicature was intended to be restrained, and if not

Term. S. Mich. 9 Georgii, 1722.

not this court, then it can be no other, because a *judge or justice* before this act was made could not bail (as hath been observed) for high treason; so that it was made purposely to restrain this court.

The *Lord Aylesbury's case* is not parallel to this case, because the *babeas corpus* was suspended only to him and them who were then committed on suspicion of treason, or treasonable practices, but not to them who were committed expressly for high treason.

So that it appears by a very plain indication, that the intent of the legislature was to restrain this court, and if so, it is as good as if restrained by positive words.

Now that it was so intended, it appears by the very words of the act of suspension, (*viz.*) *No judge or justice shall bail, &c.* which words restrain this court, and also *justices of oyer and terminer*; for if the judges are restrained, the court must be so too, because it is composed of judges; and my (a) *Lord Coke* tells us, that if the (a) 4 Inst. 71. King sat here in person, justice must be administered by the judges.

It is to be observed, that this act is penned in the most general words that could be thought on, and that the law-makers could have no other intention than to restrain the judges from bailing either in or out of court; and this seems to be the plainest construction of the act; therefore if this court can neither bail the prisoners, or try them, it will be to no purpose to grant an *babeas corpus*; so it was (b) denied, and the rather because it was denied in *Laver's case*; (b) Leave was given to enter their prayer. for the court would not try him till they had an order from the King, as the act directs.

The King *versus* Street and Stroud.

UPON a motion for a *mandamus* to the old churchwardens of the parish of C. to deliver the parish-books to the new churchwardens, &c. a rule was made for them to shew cause on such a day why a *mandamus* * should not go; at which day it was shewed for cause, that this was a new motion, and the like had never been made in this court, and that the late *Chief Justice Holt* * had denied to grant it to a steward of a court-baron. Mandamus to the old churchwardens, to deliver the parish-books, &c. denied. * P. 99. Sel. Cas. 229. pl. 186. S. P.

But that which was now insisted on was, that the old churchwardens had a *right* to keep the parish-books; so the rule was discharged, for a contest between *parish-officers*, which of them had a right to keep those books, ought to be tried at law upon a feigned issue.

The King *versus* Hutchinson, Mayor, and Aldermen of Carlisle.

Mandamus to the mayor, &c. of Carlisle.
Ante 19.
Fortesc. Rep. 200.
2 Barnard. K. B. 301.
Fitzgib. 190.
2 Kel. 268.
pl. 205.

MANDAMUS to the mayor, aldermen and common council of Carlisle, to restore one Simpson to the office of a capital burges of the city of Carlisle, of which he had been deprived by them; the return was, that the corporation had been *temps dont*, &c. a corporation by prescription, with power of amotion, and was incorporated by a charter in Charles the Second's time, by the name of The mayor, aldermen, and twenty-four capital burgesses, who were to continue for life, unless they were removed by the mayor and aldermen, or the major part of them.

(a) The person for whom the bribe was offered was not chosen mayor, but another person.

That J. Simpson was duly elected a capital burges, and took the oath accordingly, which was to regard the good of the corporation, and not to disclose the talk or word of any assembly; that he the said Simpson and one Hutchinson, intending to violate his oath, (a) offered, contrary thereto, one Harrison, a freeman thereof, sixty guineas as a bribe for his vote and interest at the election of a mayor there, and promised that they would get a place for his son in the custom-house; that by virtue of the said charter the mayor, &c. hath power to remove, &c. for any lawful cause, provided the greater part of the common council agreed to such removal; that at an assembly of the mayor and nine aldermen, he the said Harrison had exhibited an information in writing of this matter *ad effectum sequen.* &c. in open court, that Harrison made oath thereof, and thereupon Simpson was summoned to appear before them; who, after (b) his appearance, refused to answer certain articles in writing exhibited against him on this information, of which J. S. had a copy; whereupon this court of mayor, &c. adjourned from time to time three whole days one after another, expecting that he would comply before they disfranchised him; but he not complying, was by another assembly adjudged guilty, and removed *pro malegest. & offens. in informatione & articulis superius mentionat. &c. quæ causa, &c.*

(b) Quære, whether he appeared.

"Reeve, for Simpson, excepted to the return, and prayed a peremptory mandamus.

There are two questions:

"1st. No sufficient charge of an offence is laid, for which he is removed.

"The information is (*inter alia*) *ad effectum sequentem*, and the articles are *ad effectum eundem in informatione mentionat.* so that the articles being relative to the information, will be uncertain, if the information is so. The information ought to have charged the offence positively *in hæc verba*, or at least the sub-

stance of them; for as much certainty is requisite in the return of an amotion as in an indictment. An indictment for a libel *ad effectum sequent.* was held insufficient; but had it been *secundum tenorem*, it had been good; for that implies an identity. It was resolved by Holt Ch. Just. that such an indictment for a libel need not shew the very words of the libel, but *scripsit quod*, and shewing the substance thereof will be good. In any conviction before justices of the peace, as for deer-stealing, if the information is set forth *ad effectum sequent.* the conviction will be void.

Fortesc. Rep. 204.
Carth. 408.
Ld. Raym. 415.
2 Salk. 416.
11 Mod. 79.
85, 96.
12 Mod. 218.
2 Salk. 661.

2d Question. The offence being *bribery* is an offence at common law, by which law the offender may be punished, but it is against *magna charta* to deprive a man of his freedom before he is convicted of a crime by the ordinary methods which that * law pre- * P. 100. scribes; for what security can any man have from the insults of power, if he may be removed from his freedom before conviction, or before a trial by the laws of his country, to which every man hath an equal right; now if *Simpson* had been charged with *perjury* or *forgery*, which are crimes of a worse nature than *bribery*, yet he could not be removed before conviction.

11 Co. 99. a. *Bagg's* case makes the distinction, That no member of a corporation can be disfranchised by a corporation, unless they have power by charter or prescription; if they have no such power, he ought to be convicted by the course of the common law, before he can be removed; a removal, where they have power by charter or prescription is within *magna charta*, c. 29. a judgment *per legem terræ*; and if he is first convicted, that is *per judicium parium suorum*: but that distinction hath of late years been denied for law. *Lane* was removed from the office of an alderman for a libel by virtue of an express power given by the charter to remove, but he was restored, there being no precedent conviction.

Fortesc. Rep. 200, 275.
11 Mod. 270.
pl. 13.
2 Ld. Raym. 1304.

The King v. The Mayor and Burgeses of Wilton, Hil. 8 W. 3. *Mandamus* to restore *Chalk* to the office of a burges of *Wilton*: The corporation returned, that they were a corporation by prescription with power of amotion, and that they removed *Chalk* for having altered a name in one of the corporation-books: And it was adjudged by Holt Ch. Just. that he ought to be restored, 1st, because the offence being *forgery*, he was indictable by the common law, and consequently not removable without a precedent conviction. 2dly, Here did not appear any prejudice to the corporation, because the alteration might be for their advantage; and so he acted neither against his duty or oath.

Fitzgib. 190.
Fortesc. Rep. 200.

The Queen v. Perrott, Mich. 8 An. The court was of opinion that the return was insufficient, not shewing any conviction, tho' no peremptory *mandamus* was ever awarded: in that case Holt Ch. Just. said, that many things in *Bagg's* case were not law, and particularly that point where it is said, that if a layman be patron

“ patron of an hospital, he may visit it, and depose or deprive the
“ master upon good cause: but if he be deprived *sans* cause, he
“ shall have an assise; which is not law, for no assise lies, a visitor
“ being appointed.

And this inconvenience would follow, if such a removal should be allowed, (*viz.*) If the court of King's Bench should be of opinion that the removal is good, and the person should be afterwards tried for *bribery*, (which no man will deny but he may), and upon such trial he should be acquitted, then there would be a contrariety of opinions and clashing of judgments, which should be now foreseen so as to be avoided.

It is true, these persons are incorporated by charter, but the King could not give them a greater power than he had to give, for he himself cannot deprive a man of his freehold before conviction, therefore the charter giving them a power to remove, &c. must be intended for a cause not cognisable at common law, (*viz.*) by doing any thing in the corporation contrary to his office, or by not doing his office, as a justice of peace not attending the sessions, or an officer of the corporation being a *common drunkard*, or guilty of any misdemeanor against the duty of his office, and which is no crime at common law; and there is a very plain difference between doing an unlawful act, and not doing the duty of his office, for the one is a crime, the other is only a contempt.

But admitting that *Simpson* denied to answer the interrogatories, yet that cannot be a sufficient cause to disfranchise him; the rather, because it is not a matter regularly before the court; for they ought to have returned the information made by *Harrison*, and the articles specially, and not *ad talem effectum*, as was done in this return.

Admitting likewise, that what is returned is a publick offence, yet if the corporation hath received no damage by it, they cannot remove the offender before conviction; now it doth not appear by this return, that the body corporate is in the least (a) damnified; it is true, the return is, that *Simpson* intended to violate his oath; besides, a breach of some parts of his oath would be no cause, for the oath is too general, *not to disclose any talk*, whereas disclosing talk upon impertinent affairs could be no offence; but a bare *intention* shall not be prejudicial to him, unless he had done some act in pursuance of such intention; and no man can tell whether bribery at an election to promote * a particular man to be mayor, would be prejudicial to the corporation, or not.

(a) Pattison, for whom the money was offered, was not chose, but Tate.

* P. 101.

It was objected that this offence was not indictable; but certainly it is, for admitting it to be an offence, and prejudicial to the corporation, yet the person bribing ought not to be disfranchised, but rather to be indicted upon the statute of (b) *Westm. 2. c. 5.* by which it is enacted, That *none shall disturb any by force, malice or menaces, to make free election, in pain of great forfeiture*; and it is also against the common law.

(b) 2 Inst. 169.

Term. S. Mich. 9 Georgii, 1722.

In answer to the chief objection, that *Simpson* ought not to be removed from his freehold before conviction, because the crime for which he was charged is an offence at common law; this was admitted to be true, but it is a crime relative to the duty of his office in the corporation, and therefore he may be removed before conviction; it is an offence which will destroy the very being of this corporation; it is contrary to his oath of fidelity when he was first admitted to his freedom.

Econtra.

There are some cases where men have been removed for offences punishable at law, even before any conviction; as for instance; a man was removed for a (a) riot in the council-chamber, which is an offence punishable at common law, yet the offender was removed before conviction; and so was (b) *Serjeant Whitacre*, who having notice, refused to attend at the sessions of the peace, for which cause he was turned out of the recordership of the borough of *Ipswich* before conviction.

Removal before conviction.

(a) Style 457.

The King v.

Yates.

(b) 2 Salk.

434, 435.

Sid. 14. pl. 7.

2 Sid. 97.

11 Co. 99. a.

Styl. 446.

452.

4 Mod. 37.

2 Ld. Raym.

1343.

Fortesc. Rep.

206.

Ante 3.

Post 154.

377.

The like is often done in the colleges of both our universities; and *Bagg's* case, which is the *magna charta* of all cases of this nature, warrants this opinion, and especially since the statute 9 *Annæ*, which gives a *traverse* to the return of a *mandamus*, and which *Simpson* having refused, he hath thereby implicitly admitted the crime for which he is charged; because, if it was false, he might have traversed the return, and therefore he ought not to be favoured.

And as to his removal before conviction, this is a condition annexed to his freedom in this corporation, which he took, subject to be removed for any reasonable cause; and his removal is the more just, because he had all reasonable opportunities allowed him to defend himself if he could.

Upon the whole matter, a return of a *mandamus* needs not so much certainty as an information or indictment; because, if it is true, no punishment ought to be inflicted on that account.

But Lord

Fortescue

Aland is of

opinion, that

returns of

mandamus's require the utmost certainty, even much greater than an indictment, for, that may be traversed; but here the King cannot traverse. Fortesc. Rep. 204.

* The objection, That they should have set forth in the return the information of *Harrison in hac verba*, and not *ad talem effectum*, is not answered; now the reason why that information should be set forth to a certainty is, because it is the very ground of the charge by which *Simpson* was removed; and it is not sufficient to say, that so much certainty is not required in this case as in an indictment, and to alledge for a reason, that no punishment is to be inflicted upon that account, because it is a great punishment for a man to lose his freehold.

* P. 102.

The reply.

Besides, they have not set forth in this return, that *Simpson* had done any thing prejudicial to this corporation, and as to *Serjeant Whitacre's* case, it is no manner of authority in the present case; it is true, he was removed before conviction, but it was for not attending

Term. S. Mich. 9 Georgii, 1722.

tending the sessions to direct the corporation in proceedings to administer justice, which was an offence done to the corporation, and consequently a forfeiture of his office of recorder.

Chief Just.

By the return of this *mandamus* it appears, that *Simpson* was duly summoned, and that they who removed him had an authority so to do, but that it must be for a lawful cause, which did not appear by this return; for the information and the articles grounded thereon are not sufficiently set forth to inform the court of the crime, being only returned *ad effectum sequen'*; now where words in an indictment for a libel were set forth *ad effectum sequen'*; that was held insufficient in the case of *The * King versus Bear*: and there is no reason why an indictment should be more certain than the return of a *mandamus*; for in the one case the party is to be punished, and so he is in the other, (*viz.*) By the loss of his freedom.

Ad effectum sequentem, not good.

* 2 Salk. 417.

Carth. 408.

Ld. Raym.

415.

12 Mod. 218.

See 11 Mod.

79, 85, 96.

† Nota; He did afterwards retract this opinion in the case of *The King and The Mayor of Tiverton*, where he held, that bribery was a sufficient cause to remove a man from his office before conviction.

Post 186.

* P. 103.

As to the question, Whether a man can be removed from his freedom for a crime punishable at law before he is convicted of such crime; the † Chief Justice held he could not; and that in the case of *The King and The Mayor of Gloucester*, it was so adjudged in point, that bribery was an offence punishable at common law; and that a juster trial might be had in the courts in *Westminster* than by a mayor and common council-men in a corporation, who are generally corrupted, and use arbitrary methods in trials there; so he was of opinion that a peremptory *mandamus* ought to go.

* But the other three Judges were of a contrary opinion; their reasons were as follow:

¶ It is agreed on all hands, that there was a crime done, and it sufficiently appears that the corporation suffered by it; for what can be a greater injury than corrupt members? and it seems very reasonable, that where the immediate good of a corporation is concerned, that they should have power to remove him who acts contrary to such good.

That this corporation hath such a power by the very words of their charter, (*viz.*) To remove for a lawful cause, for otherwise those words are insignificant; and it would be very hard if a corrupt member could not be removed before conviction, because in the mean time he will have a vote in all corporate acts, which may be prejudicial to the corporation where such a voter is guilty of so great a crime as bribery.

Then as to the form of this return the court were equally divided, *Pratt* and *Powys* held it insufficient, *Eyre* and *Fortescue* held it well enough; and therefore there could be no judgment against the return.

Ludlam

Ludlam Chamberlain of London *versus* Lopez.

THIS was an action of debt for 25 l. brought by the chamberlain of London against the defendant, upon the statute (a) 6 Annæ, by which an (b) act of parliament for well garbling spices was repealed, by which repeal a duty arising by that act, and which was part of the revenue of the city of London was taken away, and an equivalent was granted to the said city, by taking money to admit brokers to exercise their office.

Brokers were instituted in the room of garblers of spices (a) 6 Annæ cap. 16. (b) 1 Jac. 1. cap. 19. Stra. 529.

It. Every person who shall act as a broker, or employ any man under him to act as such in the city of London, shall be admitted by the court of mayor and aldermen there, and shall upon his admission pay to the chamberlain of the said city 40 s. and every year on the 29th day of September 40 s. more, which money shall be enjoyed by the said city; and every person acting as a broker, and not being admitted as aforesaid, shall forfeit to the said city 25 l. to be recovered in the name of the chamberlain.

The defendant by his plea confessed, that he had acted as a broker in the city, and that he was not admitted thereunto; but farther sets forth the act of (c) general pardon, by which the King discharged all manner of offences which he * might or could in any wise pardon; and averred, that this was an offence which the King might pardon, &c. to which plea the plaintiff demurred, and the defendant joined in demurrer.

(c) 7 Georgii cap. 29. What shall be pardoned, and what not. * P. 104.

They who argued for the defendant insisted, that this being an offence of a publick nature might be pardoned, tho' the action for the duty must be brought by the subject; it is true the admittance-money is given to the city as a recompence for taking away the revenue of garbling spices; but yet the offence of not being admitted as a broker, is pardoned; for all amerciaments are pardoned, tho' the subject hath a right to them, and so are all popular actions before they are actually commenced, even tho' the action is given to a particular person, who is the party aggrieved; therefore this offence is pardoned with all its consequents.

For the defendant. Dy. 238, 323. Cro. El. 632, 682. 5 Rep. 49, 50. a. b.

" The trade of a broker was lawful before stat. 6 An. c. 16. so
" that the exercise thereof without a licence is only an offence
" against that act. The demand by the chamberlain in this action
" is founded on a misfeazance for acting without a licence. There
" is a duty by the act payable by every broker, and vested in the
" city, for which if any action was brought, there could be no
" pretence that the same was pardoned, that being a private pro-
" perty. This offence is made by another distinct clause of the
" act. The duty payable by the act is 20 l. for the admittance of
" every broker; but the tort and contempt in the defendant's acting
" without any licence is the original cause of this action.

The

Term. S. Mich. 9 Georgii, 1722.

For the
plaintiff.

The act which intitles the city to the forfeiture, gives it in lieu of another part of their revenue taken from them, and the money which is to be paid by the *brokers* is in nature of a rent to be received by the city for a duty which was vested in them before, and in recompence of a civil right of which they were now deprived, which recompence being confirmed by the statute, and a penalty given for not complying with that law, such penalty cannot be pardoned, especially since an action is given by the statute for the recovery thereof.

“ If the duty payable on every admittance is not pardonable, then the forfeiture for acting without admittance cannot be pardoned, because that is an injury to the city in depriving them of the duty which otherwise would be payable.

“ This may be compared to a lease with a *nomine pænæ*, or to a bond with condition of forfeiture. The city might have released the forfeiture before any action commenced, which proves an interest vested.

“ As to 5 Co. 49. an amerciamment is no satisfaction to the party, and so may be discharged. The same reason holds as to burning in the hand.

3 Inst. 195.
394.

The reason given by my *Lord Coke*, why the King cannot pardon a popular action after it is commenced, as to the informer's part, is, because an interest is then vested; but before the action is brought, no interest is vested in any particular person; and therefore the King can pardon it; which reason will hold in this case, because there is a right vested in the city before this action was brought, and before the general act of pardon was made, (*viz.*) a right to the duty arising by the garbling of spices, and a right to that recompence which was given in lieu thereof, so that this action is well brought, and not pardoned.

If an action of assault and battery is brought, the King cannot pardon the damages recovered in such action; so where a libel is exhibited in the spiritual court, and the plaintiff obtains a sentence, and *costs are taxed*, the King by a general pardon cannot discharge those *costs*; and it is * for the same reason that the King cannot pardon an *appeal*, (*viz.*) because the subject hath an interest in that suit.

* P. 105.

Curia.

2 Inst. 200.
3 Inst. 238.

This is a duty given to the city of *London*, for and instead of another duty taken from them by act of parliament, and this forfeiture is given as a provisional security for what they might suffer thereby; and therefore it is not pardonable; and as a right vests in an *informer* immediately upon bringing his action, so in this case in that very instant of time in which the offence was done, a right vested in the *Chamberlain*, which intitles him to an action for the forfeiture, and which the King cannot pardon; he cannot pardon an offence against the statute *de malefactoribus in parvis*, as far as any

Term. S. Mich. 9 Georgii, 1722.

any man hath an interest therein; it is true, it was held (a) *Big-* (a) 5 Rep. 50.
gins's case, that the Queen might pardon the burning in the hand; Mo. 571. pl.
 (b) but this seems to be the opinion of my *Lord Coke* alone; and it 782.
 is plain, that the reason he gives does not warrant that judgment; Cro. El. 632.
 for he tells us, it is because burning in the hand is no part of the pl. 27. 682.
 judgment; which is certainly a mistake, for in an appeal (as that pl. 14.
 case was) it is part of the judgment; besides, that case is reported Co. Ent. 3.
 in several other books, but the same reason in none of them for (b) This was
 that judgment; (c) therefore it is probable that the true reason said by Eyre.
 might be, because burning in the hand is a punishment to be in- (c) This was
 flicted on a criminal for the publick good, in which no particular the answer
 subject hath any right; and lastly, a pardon is properly a release given by For-
 given by the King; but it is a general rule, that a right which is tescue.
 vested cannot be released; so judgment was given against the de-
 fendant, (*viz.*) That this offence was not pardoned.

Blackwell *versus* Nash. Int. Mich. 8 Geo. Rot. 212.

THE plaintiff covenanted by indenture to transfer, &c. *South-* Of mutual
Sea Stock to the defendant, on or before the 21st day of Sep- covenants and
 tember, and the defendant covenanted to pay the plaintiff 8500 *l.* on conditions
 or before the said day; and entered into a bond in the penalty of precedent.
 16000 *l.* conditioned for the performance of the said covenant; and Stra. 535.
 now in an action of debt brought on the said indenture, the breach
 assigned was for non-payment of the 8500 *l.* and the plaintiff in his
 declaration set forth all this matter, and that *pro & in consideratione*
præmissorum, the defendant covenanted to pay the money; then he
 set forth, that he (the plaintiff) was ready at the time and place
 agreed on to transfer the stock, * and that then and there *obtulit se* * P. 106.
 to transfer it; and averred, that the defendant *adtunc & ibidem re-*
cusavit acceptare.

And upon a demurrer to this declaration, the question was,
 Whether these were mutual covenants, or only a condition prece-
 dent; for if they were mutual covenants, then the action is well
 brought, but otherwise it was a condition precedent, because then
 the performance of that condition must be set forth.

" This case was spoken to in *Mich. 8 Geo.*

" It was objected that the tender was not sufficient, for it ought
 " to be made the last instant of the day, for till then the defen-
 " dant was not obliged to accept the stock; wherefore the plaintiff
 " ought to have specified the hour when the tender was made, that
 " so it may appear to be the last instant when a transfer could be
 " made. *Lancaster (d)* and *Killingworth.*

(d) 2 Salk.
 623. pl. 31.

12 Mod. 529. Ld. Raym. 687. Com. Rep. 116. pl. 81. 3 Salk. 342. pl. 5.

Term. S. Mich. 9 Georgii, 1722.

" *Wearg contra.* This being a personal tender need not be made
 " the last instant of the day; but made any part of the day is good,
 " and differs from a tender made in the absence of the party,
 " which must be the last instant of the day, because the party has
 " till then to accept it.

" And the court seemed of the same opinion.

Sed adjournatur.

(a) Trin. term
 10 Geo. Stra.
 535.

" This term the plaintiff had judgment without argument; and
 " upon a writ of error (a) afterwards brought in the *Exchequer*
 " chamber, that judgment was affirmed.

Warren *versus* Confett.

Where *nil*
debet is a
 good plea,
 where not.
 2 Ld. Raym.
 1500.
 2 Stra. 778.
 Barnard. K.
 B. 15.
 * P. 107.

IN an action of debt brought by the plaintiff in the court of
C. B. who declared upon an indenture by which he covenanted
 to transfer twenty-five shares, &c. and the defendant covenanted
 that he would receive and pay for the transfer, &c. and bound
 himself in the penalty of 2800*l.* to perform the same, and for
 non-performance thereof this action * was brought; the defendant
 pleaded *nil debet*, to which plea the plaintiff demurred, and had
 judgment in that court for the insufficiency of the plea, for that *nil*
debet is an ill plea to this action; and thereupon a writ of error was
 brought in *B. R.* and it was argued, that this judgment was erro-
 neous.

First, An objection was made to the form of the declaration,
 (*viz.*) That the plaintiff had not set forth, that he had done all
 things necessary for him to do, to intitle himself to this action, for
 he should have alledged, that he had tendered to transfer the shares
 on a certain day, hour and place, and that the defendant refused to
 accept them; he only shews, that he was ready to transfer them
debito modo, but doth not say at what time or place, now where it
 is set forth as it ought to be, at a certain time and place, and no
 person is there to receive it, the party must shew at what time of
 the day he was at the place, and how long he stayed there; tho'
 a refusal is shewn, yet it is not shewn to be at that time.

21 H. 7. 14.
 Kelw. 153. b.
 5 Rep. 43.
 6 Rep. 44. a.

2. *Obj.* Because *nil debet* was adjudged no good plea, which is
 erroneous, it being certainly a very good plea; for where-ever mat-
 ter of fact is mingled with a specialty, or with a record, *nil debet*
 is a good plea, as in debt before auditors, it is a good plea.

Econtra.

But on the other side it was argued to maintain this judgment,
 that *nil debet* is no good plea in this case; and the chief reason was,
 because of the solemnity of a deed; now here the debt arising
 meerly upon the deed, and not on any collateral matter *debors*, in
 such case the defendant should have denied the deed, and have
 pleaded some other deed to avoid it; for if he once own the deed,
 it is then a good debt, and therefore *nil debet* is no good plea to it;
 besides,

Term. S. Mich. 9 Georgii, 1722.

besides, it is a plea which includes several issues, and for that reason it is ill.

It is no good plea to an action of annuity, nor to an action of debt on a bond brought by an administrator; it is true, it is a good plea to an action of debt brought for rent reserved upon a lease for years; but the reason is, because the demise is the foundation of the action, and the deed is only an evidence of the demise, and so it is a good plea to an action of debt brought on penal statutes, and to actions of debt brought upon awards, or to accounts before auditors; and the reason is, because these are not the deeds of the parties, but here the deed of the party himself is the very *lien*, and not any thing *in pais*; and the *gist* of the action is for payment of money.

* It is no good plea to an action on a policy of insurance, nor * P. 108.
to an action on a bail-bond, tho' there is something *dehors* to be done, to charge the insurers and the bail.

The court was divided in opinion, but seemed inclinable to reverse the judgment.

" This was first argued in *Hil.* term 8 G. then in this term,
" which argument see in *Lord Raymond* and *Sir John Strange*.

Pennoire versus Brace.

NOTA; It was ruled in this case, that where a writ of error is brought by two, and one of them dies pending the writ, the plaintiff in the original action, by entering a suggestion on the roll, that one of the plaintiffs in error is dead, may take out execution on the judgment, without suing out a *scire facias*, either against the heir or executor of the dead person.

Writ of error
by two, and
one dies pend-
ing the writ.
Salk. 319.
pl.
Comb. 441.
5 Mod. 338.
Carth. 404.

12 Mod. 130. Ld. Raym. 244. Show. Rep. 402. pl.

Flemming versus Parker.

THE plaintiff declared on four counts, and the defendant demurred to one, and pleaded to issue as to the other three, and the plaintiff joined in demurrer, and had judgment and a writ of inquiry, reciting a judgment *de præmissis*, and that *recuperare debet damna occasione præmissorum*; and now it was moved in arrest of judgment, that a writ of inquiry would not lie on this judgment until *nolle prosequi* was entered as to the other three issues, or a *venire* to try them; for then, and not before, a writ of inquiry might be had to inquire of the damages upon the judgment in demurrer; but in this case the plaintiff having remitted the damages as to the other three issues, before the judgment was entered on the demurrer,

Writ of in-
quiry where
it ~~will~~ lie,
where not.

Term. S. Mich. 9 Georgii, 1722.

demurrer, it was held good; and the master of the office affirmed, that was the proper method of proceeding.

* P. 109. * Coatsworth & Ux', administrator of W. S. *versus* Shaftoe. Friday 23 Nov.

Where costs shall be paid by an administrator.

See Stra. 682.
2 Stra. 785.
Barnes 186.
Andr. 357.
359.
Reg. C.P. 115.
Ventr. 92.

TROVER. The plaintiffs declare that their testator *W. S.* 8 Dec. 1718. was possessed of ten horses, & *sic inde possessionatus existens eodem die & anno obiit intestat. post cujus mortem ss. 23 Apr. 1720.* Administration was committed to the plaintiffs; *posteaque ss. 8 Apr.* the said horses were lost; & *eodem die & anno devener. per inventionem* to the defendant, who converted them, &c.

“ Not guilty; and verdict *pro defendente.*

“ *Fazakerly* moved, that the defendant might recover his full costs. The difference is, where-ever an executor brings an action, and upon his declaration shews matter sufficient to enable him to sue in his own name, without styling himself executor; if a verdict pass against him he shall pay; but otherwise where he is obliged to sue as executor. The plaintiff here might have declared on his own possession, and the evidence would have been sufficient: the goods being lost *after* the administration committed, there was a possession in the administrator, which would have enabled him to have brought the action in his own name; so that the conversion is an injury to the administrator. *Pauler versus Delander.*

“ On the other side it was argued, that an executor shall never pay costs, unless he declares upon an actual possession. 2 *Lev.* 165. 3 *Lev.* 60, 375. 6 *Mod.* 9. See 2 *Stra.* 1107. *Andr.* 358.

Cur. This point ought not to be now questioned, all the cases were considered, and the point settled, in the case of *Pauler versus Delander.*

Cooper *versus* Beale.

In ejectment judgment cannot be entered upon confession of the casual ejector.

AN ejectment was brought to recover the possession of the *Quakers* meeting-house; none of them would receive the declaration, and the meeting-house was never open but on *Sundays*, on which day the delivery of a declaration is not good; thereupon the plaintiff took a judgment by confession of the nominal defendant, and now upon a motion that judgment was set aside, because in fact it is the confession of the plaintiff himself.

Holoway

Term. S. Mich. 9 Georgii, 1722.

Holoway versus Thurston.

IN an action on the case, &c. the plaintiff declared, and laid his damages to 400 l. the defendant pleaded the statute of limitations, (*viz.*) *Non assumpsit infra sex annos*; the plaintiff replied, that he sued out a *latitat* to take the defendant two years before the action brought, for 150 l. and upon a demurrer to this replication, it was insisted for the defendant, that these were different actions, for no man would take out a *latitat* for 150 l. and declare *ad damnum* 400 l. it is true, if the plaintiff had averred it had been one and the same cause of action, it might have been otherwise; and so it was ruled by the court.

The statute of limitations pleaded. W. Jo. 213. S. P.

Wright versus Mason.

UPON a motion for an attachment against the defendant and one *Purcell*, an attorney, for foul practice, and for oppressing the defendant, by threatening to take him up by a warrant of the Chief Justice, and by colour thereof getting some money from him, and a note under his hand to pay more for not sending him to *Newgate* for a trespass they pretended to be done by his wife; a rule was made for them to shew cause on such a day, why an attachment * should not go against them; and upon that day they appeared and produced several *affidavits*, which were read in court, and by which they denied the charge, but not positively and directly; and it appearing by the *affidavits* that the fact was done by the wife, there was no colour to procure the warrant of the Chief Justice against the husband; and it farther appearing that the attorney had endorsed this note to another, on purpose to load the defendant with an action, he was ordered to stand committed until he should answer interrogatories, which were to be filed in four days; and afterwards, in answer to the interrogatories, he swore off all that was charged against him, for which he was indicted, and convicted of perjury.

Attorney was ordered to answer on interrogatories for foul practice.

* P. 110.

Cæsar versus Holt & al'.

A Rule was made for the defendants to shew cause on such a day, why an attachment should not go against them for committing a *rescous*, &c. and now they shewed for cause, that such attachments ought not to be allowed upon *affidavits* of a rescous, because in such case the parties might be taken into custody before the writ is returned; therefore the sheriff ought to return a *rescous* before the defendants should be prosecuted for it; and the court was

Rescous, &c. An attachment shall not be granted before return of the writ. S. P. 2 Barnard. K. B. 58. See Post 342.

Term. S. Mich. 9 Georgii, 1722.

of that opinion, (*viz.*) That the sheriff ought to return the writ, which, if false, then the plaintiff hath an action against him; but if the return is true, then the action lies against the rescuers; therefore if an attachment should be granted on an affidavit of a rescous before the return of the writ, the defendant could have no action against the sheriff for a false return.

* P. 111.

* D E

Term. Sanct. Hill.

Anno 9 Georgii, 1722.

The King *versus* The Mayor and Burgeses of Tregony.

Mandamus to
chuse a may-
or, &c.
Post 127.

UPON a motion for a peremptory *mandamus*, the case was, that a former *mandamus* was directed to the mayor and burgeses of Tregony in Cornwall, commanding them, (*viz.*) *Quod eligetis & juratis majorem, &c. secundum auctoritatem vestram, &c.*

It was moved for a *superfedeas* to that *mandamus*, for that the writ was not good, because it was directed to the mayor and burgeses to elect and swear a mayor; whereas the power of electing is only in the burgeses, and the power of swearing in the mayor alone; so that the mayor cannot make a return of this writ as directed to him to elect; nor the corporation as directed to them to swear a mayor, so that if the burgeses should make a return as to the swearing part, they would be usurpers, and if they do not make a return, they will be in contempt of this court.

Besides, it is incongruous for a *mandamus* to be directed to swear a mayor not yet elected; therefore it being directed to a person who had no power to act, it ought to be superseded, like the case of the city of London, where such a *mandamus* was directed to the mayor and aldermen, &c. when the power was in the mayor alone, and that was adjudged in this court to be not good.

But the court were all of opinion in this case, that they ought to make a return, for the writ commanding them, *Quod eligetis & juratis*

Term. S. Hill. 9 Georgii, 1722.

juratis secundum auctoritatem vestram, it * shall be taken *reddendo* * P. 112.
singula singulis, and to be the return of both, &c.

Then they returned, that *Tregony* is a borough incorporated by letters patent of King *James the First*, by which it is provided, that they proceed to an election of a mayor every year, on the *Thursday* next after *Michaelmas day*, and that the mayor elected at that time shall continue mayor until another is duly elected; and farther they return, that the day of election being past, they cannot obey it, and proceed to a new election on any other day than that very day appointed by the charter by which they are incorporated, unless on the death or amotion of the mayor.

Return of
Mandamus.
See post 127.

And now the following objections were made both to the writ and the return.

And first as to the writ, that it was directed to the mayor and burgeses to elect and swear a mayor, where the power of swearing, &c. is in the mayor alone; and tho' the court was of opinion, that this writ ought not to be superseded before it was returned, because if there is a fault, it might judicially appear before them; yet when the fault appears upon the very return itself, the writ ought to be quashed.

Objections to
it.

Now there is a plain difference between a writ to elect, and another to swear a man into his office; for the writ to elect may be directed to the whole body corporate, of which the mayor is the head; but a writ to swear the person elected must be directed to the mayor alone, because no other person hath authority to swear him, and no such authority can be given but by special words in the charter; and it would be very hard if this writ should be good, because the execution thereof would subject the parties to an information for usurping an authority where they had none.

Then as to the return, it is, that they could not obey the writ, because the day of election of a mayor was lapsed, and that they could not proceed to a new election, but upon the very day appointed by their charter, unless upon the death or amotion of the mayor in being.

In answer to which it was argued, that the day was only directory, and that there could be no inconveniency, if they should proceed to an election on any other day, because the writ of *mandamus* usually goes to fill up the body corporate, for the sake of succession, which is a case of necessity.

But they who argued for the return, said there could be no such necessity in the present case, because the corporation was full; therefore there was no necessity to elect on any * other day than on * P. 113. that appointed by the charter; besides, if the return is not true, it ought to have been † traversed.

† See Stat.
9 Ann. cap.
Curia.

The court was of opinion, that the writ was good upon a reasonable construction of the words *reddendo singula singulis*; for it is directed to the *body corporate*, who hath the inheritance as to the election

Term. S. Hill. 9 Georgii, 1722.

election of a mayor, and likewise to him who hath the special power as to the swearing a mayor, it being that *eligitis & juratis secundum auctoritatem vestram*.

Now all those to whom the writ is directed, are to do something, for they are all to be present at the swearing a new mayor when the oath is administered to him, which is usually done by the town-clerk, and so far they may be said to have a power to swear him, for the mayor is present, and so are the burgeses at that time.

See Stat. 11
G. c. 4.

Then as to the return it is likewise good, for though it hath been said that the day is only *directory*, yet it is clear by the charter, that they must chuse a mayor on the very day therein appointed, which is on *Tuesday* next after *Michaelmas day* every year, and that he must continue mayor till another is chosen, *secundum formam literarum patentium*; now it cannot be said, that a mayor chosen on any other day was elected *secundum formam literarum patentium*, for which reasons it was adjourned. See *post* 127.

Atwood *versus* Beach.

Sci. fa. against
the bail of
John, when
his name was
Thomas.

(a) 1 Lev. 41.
Sid. 54. S. C.
Raym. 19.
S. C.

* P. 114.

JUDGMENT was had against the principal, and a *sci. fa.* was brought against the bail of *John King*, when his name was *Thomas King*, and after two *nibils* returned, the bail were taken in execution; and this matter appearing now to the court upon a *motion*, the counsel for the bail prayed, that they might be discharged, which was accordingly done; *sed per curiam*, if the *scire facias* had been returned *scire feci*, they could not be discharged, because they might have pleaded this matter in abatement, like the case of (a) *Day and Guilford*, which was tenant for life, remainder to his issue in tail, the tenant for life acknowledged a statute, and died; then the cognisee brought a *scire facias* against the heir, who was the issue in tail, and the sheriff returned *scire feci*; and thereupon judgment was had against him; and being turned out of possession of the lands by virtue of that judgment, he brought an ejectment, &c. and it was adjudged, that he was bound by the execution, and that he had no remedy either by ejectment, or by * writ of error, or *audita querela*, or by any other means, but only by action against the sheriff for a false return, (if it was so,) because it was his own fault by not pleading to the *scire facias*, (*viz.*) That he was the issue in tail after the sheriff had returned him *warned*.

The

The King *versus* The Mayor of Tenterden.

A Rule was made for the mayor to shew cause why an information should not go against him, for taxing several persons who *lived out of the corporation* to be contributory to the building a bridge, and other charges within the *corporation*; who shewed for cause, that tho' the persons thus taxed did not live within the *corporation*, yet they dwelt within the liberties thereof, and were intitled to the like privileges of those who lived within the *corporation*; one whereof was to be exempted from all taxes in the county at large, so that it is reasonable they should be contributory to the charges within the *corporation*, when they had the benefit of the privileges thereof; besides the tax now in question had been paid by such out-dwellers time out of mind.

Information against a mayor, taxing men who did not live in the corporation.

But the court directed, that this matter should be tried upon an *information*, and that for two reasons; the one because a single person might not be able to contest this matter in an action against the whole *corporation*; and the other because if a verdict should pass for or against such single person, it would not end the contest which might happen against the rest.

Curia.

Hodgkins *versus* Corbett.

LIBEL in the spiritual court for these words, *Thou art a cuckoldy old dog, call down the bitch your wife.*

Prohibition to the spiritual court for words upon the custom of London. Stra. 545.

And now upon a motion for a *prohibition*, the suggestion was, that there is a custom in *London* to punish whores by carting and whipping them; and that the said words are actionable there by the custom of the place, and avers, that if the words set forth in this libel were spoken, it was in *London*, in the parish of, &c. and tho' the plaintiff might have a remedy at law against the now plaintiff in the prohibition, for speaking the said words, yet he had exhibited a libel, &c. and upon this suggestion a prohibition was granted; * and it was now moved for a consultation; for admitting these words were spoken in *London*, yet they are not actionable there by the custom of the city, because the custom extends only to such words which are *directly* defamatory, and not to such which are so by implication; and to prove this matter, the cases in the † margin were cited.

* P. 115.

† Cro. Car. 339.
Vent. 220.
Sid. 248.
2 Lutw. 1042.
2 Rol. Abr. 296.

The case of *Houblon* and *Milner*, reported in *Lutw.* 1042. was for calling a man's wife a *common woman*; and there was the like suggestion, as in this case, for a prohibition, but it was denied, and a consultation granted; and the reason there given is, because the

Term. S. Hill. 9 Georgii, 1722.

custom of *London* extends only to calling a woman *whore*, and not to such words from which it may be collected she is so.

"The words are uncertain, because the husband might be a cuckold by a former wife, and not by the plaintiff: So that if the words are not actionable by the custom of *London* the suit in the spiritual court must proceed.

(a) Eyre Just.
upon the first
argument
said, that
2 Lutw. had
been denied.

"*Northey contra.* The case in 2 *Lutw.* hath been (a) denied for law; wherever the husband and wife libel for words spoke of the wife: all the latter authorities are, that an action lies in *London* for words tantamount to calling a woman *whore*: and prohibitions have been accordingly granted. *Hil. 12 Ann. Gibbons v. Harwood.* The plaintiff being a single woman libelled in the spiritual court for these words, *she is with child*; a prohibition was moved for and granted upon a suggestion of the custom of *London*, tho' the same objection was made; for the words are a charge of the crime of incontinence, which makes the offender liable to punishment by the custom of *London.* *Pasch. 1 Geo. B. R. Milbourn v. Povey.* The plaintiff libelled against the defendant for calling her husband cuckold: and there a prohibition was granted upon the same suggestion.

"*Pratt Ch. Just.* If the uncertainty of the words is an argument why no action lies by the custom of *London*, the same argument holds why they are not suable in the spiritual court. It is very nice to maintain that no action lies unless for the word *whore*; if the words import a charge of incontinence, they are actionable in *London.*

"As to the uncertainty, the latter words, *call down the bitch your wife*, tie up the former so as to make them relate to the plaintiff.

Sira. 555.

Andr. 300.

Fortesc. Rep.

347.

4 Bac. Abr.

521.

"The case of *Gibbons v. Harwood* is truly stated; and in that case Mr. *Dee*, common serjeant, satisfied us that an action lies in *London* for any words that amount to calling a woman *whore*.

"*Eyre Justice.* An action lies in *London* for words tantamount, *Mich. 11 W. 3. Smith v. Smith*, a libel was for these words, *she was never married; what is her hopeful son?* and a prohibition was granted upon a suggestion of the custom of *London.*

"And the court took time to consider till the last day of the term, when they granted a prohibition; for the words are a certain charge of incontinency, which are actionable by the custom of *London*, 2 *Lutw.* 1042. is good law, for there the words were, *Thou art a common woman*; which do not amount to calling *whore.* *Milbourn v. Povey* is a case in point.

"So in the principal case the prohibition was held good, and the consultation was denied.

Lowther & Ux' *versus* Kelly.

MR. Lowther, the now plaintiff, being seised of the lands in right of his wife, whilst he was in *Barbadoes*, gave a letter of attorney to *W. R.* empowering him to demise the land, who by virtue thereof, and of the power therein given, by indenture in his the said *W. R.*'s own name, made a lease of an house to the defendant, rendring rent to the plaintiffs, in which lease *Kelly*, the defendant, covenanted with the plaintiffs to pay the rent.

Where a stranger to a deed or promise may bring an action.

And now in an action of covenant brought upon this indenture by *Lowther* and his wife, who were no parties to the indenture, the breach assigned was, for non-payment of rent, &c. And the wife dying since the last continuance, the defendant pleaded that matter in abatement. Verdict for the plaintiff, and motion in arrest of judgment.

But it was insisted for the plaintiff, that the action survives, by suggesting the death of the wife upon the roll; and this is by virtue of the statute $\dagger$ 8 & 9 *W. 3.* by which it is enacted, That where $\dagger$ 8 & 9 *W. 3.* there are two or more plaintiffs or defendants, and one or more of them shall die, &c. the writ or action shall not abate; but such death being suggested on the roll, the action shall proceed, and therefore this plea in abatement ought to be quashed.

* But the court would not quash it upon a motion, therefore the plaintiff suggested this matter on the roll according to the statute, and so proceeded in the action. * P. 116.

And the question upon the pleadings was, Whether the plaintiff could maintain an action of covenant upon this indenture; and it was argued that he could not, because he was not a party to the deed, but a meer stranger to it; and the reservation of the rent was to a stranger, and so was the covenant to pay it; and such a covenant cannot be good to one who is no party to the deed.

Co. Lit. 52. b. Dyer 132. Moor 819. So it was afterwards adjudged in the case of *Frontin v. Small*, 2 *Ld. Raym.* 1418.

Therefore he who hath a letter of attorney to act for another, if he makes a lease in his own name (as was done in this case) such lease is void, for it should be made in the name of him who gave the power and commission to act in his behalf.

It is true, in a deed-poll there may be a covenant in behalf of a third person, but not in an indenture; therefore where there is a covenant * between *A.* and *B.* that such a sum of money shall be paid to *C.* this is not good.

1418. Stra. 705. 9 Rep. 77. Moor 818. * *Inst.* 47. a. 2 *Roll. Abr.* 448, 450, 453.

So that this being a covenant or contract in an indenture, no man can take advantage of it but he who is a party to it.

The master cannot have an action against the defendant for hiring his servant to work with him (the defendant) without shewing that the contract was made with him (the plaintiff).

So

Term. S. Hill. 9 Georgii, 1722.

2 Cro. 653.

So where the cattle of the master were sold by his servant, and a bond taken in the servant's name for payment of the money, but to the use of the master, and he brought the action upon this bond; adjudged that it would not lie, because he was no party to the bond, for he could not release it.

1 Lev. 235.

2 Lev. 74.

3 Lev. 138.

1 Vent. 6.

Bourn v. Ma-

son.

So where one *Parry* was indebted both to the plaintiff and the defendant, and *W. R.* was indebted to *Parry*, and the defendant promised, that in consideration *Parry* would permit him to sue the said *W. R.* he would pay the debt due to the plaintiff; and upon an action on the case brought on this promise, and *non assumpsit* pleaded, the plaintiff had a verdict, but could never get judgment, because he was a stranger to the consideration; and in this case it was laid down for a rule, that no person shall recover upon an agreement, but he who is party or privy to the consideration thereof.

* P. 117.

Therefore where a man promised the father to pay his daughter 40*l.* at or upon her marriage-day, and she afterwards * married, and the husband and wife brought the action for the 40*l.* adjudged, that it would not lie, but that the father alone, to whom the promise was made, should bring the action.

Econtra.

On the other side it was argued in behalf of the plaintiff, that "there is no reason why a person with whom a covenant is made should not be intitled to an action for breach thereof, tho' he be no party to the deed. The rule of law is, that no person can take an estate *in presenti*, unless he is a party: and yet if such interest passes by way of use, he may take without being party."

* 1 Vent. 318.

2 Lev. 210.

Raym. 302.

T. Jones 102.

There are many resolutions in parallel cases to support this action; as for instance, the case of * *Dutton* and *Ingram*, which is reported in several books, and was thus:

¶ The plaintiff declared, that his father-in-law being seised in fee, &c. and being about to fell timber to raise a portion for his daughter (who was the plaintiff's wife), the son and heir on whom the lands would descend after the death of the father, promised the father, that in consideration he would forbear to cut down the timber, he the son (the now defendant) would pay the daughter 1000*l.* and for non-payment of this money the action was brought by the husband and wife, and they had a verdict and judgment; but upon a motion in arrest of this judgment it was objected, that this action ought to have been brought by the father, to whom the promise was made; to which it was answered, that tho' the promise was made to him, yet he was not concerned in the meritorious act; and that there being such a nearness of relation between the father and the daughter whom the plaintiff had married, that he the plaintiff is now concerned in the very promise made to his father-in-law.

Lever v.

Hayes, Moor

550.

So where the father of a young woman promised the father of a young man, that in consideration he would settle such a jointure on

Term. S. Hill. 9 Georgii, 1722.

on her, he (the father) would give his son 200 l. more upon his marriage with the daughter; in this case it was adjudged, that the son, tho' he was a stranger to the promise (for that was made to his father) might bring the action, because the meritorious act was done by him, (*viz.*) The marrying the daughter; but in the case of *Mason and Bourn* before-mentioned, the plaintiff did nothing of any trouble to himself, or of any benefit to the defendant.

So where the defendant promised the plaintiff (who was a physician) that if he performed such a cure, he would give him (the physician) so much money, and so much to his daughter: Adjudged, that the daughter might bring an action for her money, tho' she was a stranger to the promise, and likewise to the consideration, because the nearness of * relation between father and daughter gives * P. 118. her the benefit of the consideration for her father's performance.

" *Pratt* Ch. Just. By deed poll a man may devise to or covenant with another person; and an action lies: and yet there are no parties to such deed.

" *Eyre* Just. Every contract is made between parties: A letter of attorney may be contained in an indenture without making the attorney a party, because in that case no interest passes to the attorney.

Adjournatur.

Smith *versus* Jones.

THE practice of the court of King's Bench is, for the plaintiff in ejectment to deliver a copy of the declaration to the tenant in possession, or to his wife, with an indorsement in *English* of the substance of such declaration, &c. and if the tenant doth not appear in the beginning of the next term, then upon *affidavit* made of the delivery of the copy of the declaration (affixed to such affidavit), and of reading the indorsement, or of acquainting the tenant with the contents thereof, the court will make a rule for the tenant to appear and plead on a certain day; at which time, if he appears, he must by his attorney file common bail, and enter into a rule to confess lease, entry and ouster, and leave it at a Judge's chamber, and give notice thereof to the attorney for the plaintiff, that he may proceed.

Error in the Exchequer-chamber will not lie upon a judgment in ejectment against the casual ejector.

But if the tenant in possession doth not appear, then after the day appointed by the court for his appearance, and to plead, judgment by default shall be entered *against the casual ejector*.

Now in this case, a declaration in ejectment was delivered, and a rule made for the tenant in possession to appear and plead, which he (a) did, &c. and afterwards withdrew his plea, and confessed

(a) Quære whether he

pleaded Not guilty, and then withdrew his plea: or whether the plaintiff's attorney made up the paper-book with Not guilty; and when he came to deliver it to the defendant's attorney, he refused to plead Not guilty, and struck it out of the paper-book, and gave a *Cognovit actionem* with judgment against the tenant in possession, at the same time giving notice of a writ of error brought in the name of the tenant in possession.

judgment, which the plaintiff entered *against the casual ejector*; and now the tenant in possession moved by his counsel to set aside this judgment; the reason was, because he might bring a writ of error, for no such writ would lie on a *judgment against the casual ejector*, therefore the judgment ought to be entered against the tenant himself; for wherever the defendant is in court, the judgment must be entered against him, and not against the casual ejector; now here he was in court, for he appeared and pleaded to issue, and might come in at any time, and confess lease, entry and ouster, &c. And if the judgment had been entered against the tenant, it had been better for the plaintiff than to have it entered against the casual ejector, because in such case the plaintiff will have his costs, and will be entitled to an action to recover the value of the * mean profits in damages, which he can never recover by a judgment against the casual ejector.

P. 119.

Thereupon the court enquiring of the master of the office what was the practice of the court in such cases, both he and several old practitioners affirmed, that the practice was to enter *judgment against the casual ejector*, and that he had often denied to sign judgment against the tenant in possession, unless he had pleaded; it is true, he pleaded in this case, but afterwards he withdrew his plea, and tho' he had pleaded, yet he is not a defendant till he enters into a rule to confess lease, entry and ouster, for then, and not before, he is a compleat defendant, and may plead to issue; but whether he appears or not, yet judgment shall be entered against the casual ejector; it is true, it is sometimes entered against the tenant in possession, but that is by consent of the parties, and upon a promise not to bring a writ of error.

Curia.

The Chief Justice was of opinion, that there was no instance of a judgment being taken against the tenant in possession for want of a plea; that words of the rule are positively certain that judgment shall be entered against the casual ejector. He was doubtful in this point. It is the right of the subject to *give judgment by confession*. It is likewise his right to bring a writ of error upon such judgment, of which right he cannot be deprived by a rule of this court, or by any other court whatsoever.

Now the intent of the rule, for the tenant in possession to appear on a certain day, and plead, is only to bring him into court, that when he comes in, he may confess lease, entry and ouster: but not to strip him of that right to which he is entitled by law, as it will if this judgment should stand *against the casual ejector*, because no writ of error will lie in the Exchequer-chamber upon such judgment.

" This way of delivering an ejectment is in nature of process to
 " compel the tenant to appear in court, and was first instituted in
 " the Lord Chief Justice Roll's time, and never questioned till now.
 " There is a difference between appearing and pleading, and ap-
 " pearing and not pleading at all.

Term. S. Hill. 9 Georgii, 1722.

"Eyre was clear for the plaintiff, that judgment should be entered against casual ejector, but the other three were doubtful;"
"so it was adjourned."

The King *versus* Inhabitants of the county of Surrey.

UPON a motion made to discharge a rule for an information Information against the county for not repairing a bridge. against the inhabitants of the county for not repairing a bridge, it was alledged, that the parishioners of *Mitcham* in that county ought to repair it, which they had done time out of mind; it is true, that parish had obtained a verdict against the county, but it was by surprise; * for by *certificates* and other records of the sessions, it will appear that this parish ought to repair this bridge, and that they had been fined for not repairing; and that they had acquiesced under that charge many years. * P. 120.

It was insisted for the parish, that admitting they had repaired this bridge, yet if they were not obliged so to do, either by *prescription* or *tenure*, they shall not always be liable; they cannot be obliged by *prescription*, because the inhabitants of this parish are not a body politick, and it is not pretended, that they are obliged by tenure.

To which it was answered, that an information against the county in general was the only way to try the right; for tho' this parish might not be obliged to repair the bridge, yet some other parish might, and since the county is *prima facie* to repair it, it is probable that when the information is exhibited against them, the inhabitants of *Mitcham* to excuse themselves may shew who is obliged to repair it; and the court being of that opinion, the rule was made absolute.

Mosse *versus* Bennet.

TRESPASS on the case against the defendant, for disturbing the plaintiff in his common; wherein he set forth, that the defendant had covered three acres of the common field with hurdles, and had enclosed three acres more, &c. Where the defendant should plead the general issue, and give the special matter in evidence.

The defendant pleaded, that the college of *Newelme* in the county of *Oxford* was seised in fee of the lands in the declaration mentioned, and being so seised, made a lease thereof to the defendant for life, and that he (the defendant) had a right by prescription to have a fair on the said common every year on such days in the year, and to have hurdles to keep and enclose cattle there, and a right to so much of the ground on the said common as would keep the said hurdles from fair to fair, and so justifies the enclosing three acres with hurdles, and the covering three acres *cum cratibus prædictis*, and avers it to be the same trespass.

And

Term. S. Hill. 9 Georgii, 1722.

And upon a demurrer to this plea, it was objected, that it was ill and repugnant, because a *seisin in fee* was laid in the college, and an estate for life in the defendant; but it was disallowed, for it is good *reddendo singula singulis*.

Thus it was objected, that the defendant had justified the *enclosing* three acres, and the *covering* three acres, but did not say, that the covering was *in aliis tribus acris*; so that the plaintiff having
* P. 121. declared for a disturbance in six acres, * the defendant had only justified in three acres, which the court held to be a fault incurable, and the rather because this being an action on the case for disturbing the plaintiff in the enjoyment of his common, the defendant might have pleaded the general issue, and have given this special matter in evidence.

D E

Term. Paschæ,

Anno 9 Georgii, 1722.

Sir Alexander Anstruther *versus* Christy.

Writ of error,
no superedeas
unless the
plaintiff in
error put in
bail.

AN action of debt was brought in the Common Pleas upon a contract for payment of money on *South-Sea articles*, at the end whereof the parties bound themselves to each other in such a sum, for the true performance thereof, &c. the plaintiff had judgment.

And now the defendant brought a writ of error in the King's Bench, and the plaintiff in the action insisted, that this writ of error was no *superedeas* to the execution on the original action, unless the plaintiff in error had put in bail according to the statute 3 Jac.

Now as to that matter, it is true, he did put in bail, but the plaintiff in the original action, excepted against them as insufficient; and nothing farther was done in order to justify them, or to put in other bail; and certainly he shall not be concluded by the giving

* P. 122. insufficient bail, as they on the * other side would have it; and compared it to the case of *Reeve versus Pike*, where after the defendant

Term. Pasch. 9 Georgii, 1723.

defendant had put in bail, he moved that they might be discharged; but it was denied.

Now this being an action of debt founded on a contract for payment of money; therefore by the very words of the statute, *bail* is requisite on a writ of error of the judgment on such action, otherwise that writ is no *superfedeas* to the execution.

It is requisite on an action of debt on a *nomine pœnæ* in a lease, tho' it is otherwise in replevin or covenant; and the reason why it is not required of an executor, who brings a writ of error, is not, because it is not requisite in the original action, but because they are supposed to be ignorant of the estate of the testator.

On the other side it was argued, that this writ of error was ^{Econtra.} a good *superfedeas*, and that it is not necessary to put in *bail* on such a writ, it being brought on a judgment obtained on a bond for * non-performance of covenants; for wherever the debt ^{* 2 Bulst. 53. Yelv. 227.} is not directly due on the bond, or any other agreement, but accrues upon the non-performance of something collateral to that on which the action is founded, there no ^{† 2 Cro. 350. Cro. Car. 509.} *bail* is requisite; and [†] this is a bond for payment of money for non-performance of articles; it is true, the bond itself is included in the very articles, but there is no material difference between such an obligation and a bond or note, with a condition for performance of articles; for wherever the action is founded on the articles, there bail is not requisite, and so is *1 Lev. 260. Biddolph versus Temple.*

The statute requires, that where an action is brought on a *single Curia. bill or bond, or contract for payment of money only*, that in such case bail shall be given, which implies, that it is not requisite on any other bond or contract; it is true, this is a contract, but it is not for payment of money only, but to pay it upon non-performance of an agreement, and so not within the provision of this statute.

But tho' bail is not requisite to the original action, yet it must be given upon a writ of error of a judgment obtained in such action; as for instance, if an action should be brought in *B. R.* for *5 l.* there bail is not required, but if judgment is obtained in that action, and a writ of error brought, certainly bail must be put in.

So judgment was given, that this writ of error was no *superfedeas*, unless good bail was put in.

* The King versus Wiatt.

* P. 123.

1. l. Porter. 201. See my remark there.

UPON a motion for an attachment against the defendant for ^{Attachment against the defendant for a libel, &c.} publishing a libel against a doctor of divinity in the university of Cambridge, and a rule being made upon him to shew cause on such a day, why it should not be granted; he now moved by his counsel to discharge that rule upon an *affidavit* that his fault was not wilful, but merely thro' ignorance; that he had the libel from one

Term. Pasch. 9 Georgii, 1723.

Crownfield, a printer in *Cambridge*; that it was in *Latin*, which the defendant did not understand, and that he did not know who was the author, otherwise than by a letter which he received from the printer, and which was now annexed to his *affidavit*, by which letter it appeared, that one *Dr. Middleton* was the author; so that having shewed how he came by this libel, and having told all that he knew of the author, for that reason it was insisted in his behalf, that the rule should be discharged, and that the printer should be prosecuted.

But the rule was continued on the defendant until he made out his allegation against the printer, who was therefore joined in the rule, that both of them might be before the court.

(a) Lord Fortescue observes that this was an honourable action in *Dr. Middleton*, as it excused *Wiatt*.
Fortesc. Rep. 201.

In the next term *Dr. Middleton* appeared and confessed in court, that he was the author of the book; and thereupon the rule was discharged against the defendant and the printer, and the Doctor was committed till farther consideration of the matter.

And within a few days afterwards he was brought into court, and fined 50*l.* and bound to his good behaviour for a year, and so was *Dr. Colbatch* the same term, for the like offence.

Goodright *versus* Opie.

Devise
Residuary legatees, where he shall not take by the will.
See Fortesc. Rep. 182, 185.

* P. 124.

IN ejectment, upon Not guilty pleaded, the jury found the defendant Not guilty as to part, and as to the other part there was a special verdict, the substance whereof was thus:

¶ The testator being seised in fee of several lands, did, in the year 1705, devise all his said lands to five persons (naming them) and to their heirs, as tenants in common; that one of the said devisees died two years before the testator, * who by another clause in the said will, devised all his other messuages, lands, &c. not therein before given, devised or bequeathed, and all his money, household goods, plate, rings, &c. and all his estate real and personal whatsoever of what nature or kind soever, to his two nieces *Mary Buce* and *Mary Opie*, their heirs, executors and administrators; that the testator died without making disposition of the said fifth part of his lands, other than by his last will as aforesaid.

See postea 321. the case of *Wright v. Horne*.

The question was, Whether the same should descend to the heir at law of the testator, as not being disposed by him in his life, because the devisee died before him, or whether it should pass to *B.* and *C.* as residuary legatees by the latter clause of the will, as an estate not before disposed by the testator.

Those who argued for the lessor of the plaintiff, who was heir at law, insisted, that this fifth part of the lands should descend, because it could not pass by any possibility to the first devisee, for he was dead before the testator; therefore it must necessarily revert in him, and by consequence must descend to his heir at law; that there

there is no case wherein it hath been resolved, that a *residuary legatee* in a will shall carry the lands which have been before disposed by the same will, tho' it should happen that they cannot pass to the first devisee, either by reason of death or any other incapacity; that wills are commonly guided by the *intention* of the testator, and that there was not a word in this will which shewed he intended these lands should pass to the *residuary legatees*; neither is it pretended by them, that he knew the first devisee was dead.

Now it is a settled rule in the construction of wills, that both as to the persons taking, and as to the estates which they take, all must arise from the *intention* of the testator, which intention must be collected out of the words of the will itself; now here are no words in this will which import that the testator intended these lands should pass to residuary devisees.

This being premised, and it plainly appearing by the first clause of this will, that the testator had disposed *all his lands*, * therefore the words *real and personal estate* in the last clause, shall be intended a devise of his *chattels real*; for it is absurd to say, that what he had before devised to one in fee, should go over to another. * Cro. Car. 447, 449.

Besides, he having devised all *other his real and personal estate* not before devised, there the word *other* is a relative, and cannot refer to any lands before given, but makes that clause as strong as if he had excepted the lands before devised, by particularly naming them, because there must be * *other lands* to satisfy that word, and which were not devised before; but the lands now in question were devised before. * P. 125.

But admitting it to be the *intention* of the testator, that the fifth part of his lands should pass to the *residuary legatee*, yet if the words in the will are not apt for that purpose, those lands will not pass; and so it was resolved in * *Steed and Berrier's case*. * Raym. 408. Vent. 341. 2 Mod. 313. T. Jo. 134.

The case which comes nearest this point, and which probably may be objected on the other side, is reported in + this, (*viz.*) The testator devised a manor to T. S. for *six years, &c.* and afterwards by the same will he devised *all the rest of his lands in Somersetshire*, or elsewhere, to his brother and his heirs: It was adjudged, that the reversion after six years passed; but in that case, and some || other of the like nature, it appears in the wills themselves, that the testators had other estates to dispose, and that they used sufficient and apt words to pass them. + All. 28. S. C. cited in 3 Mod. 228. 6 Mod. 111. 2 Ventr. 286. Fortesc. Rep. 227, 229. 3 Wil. Rep. 63. || Lev. 212. Saund. 180. 2 Vent. 285.

The question was truly stated on the other side, (*viz.*) Whether the *fifth part* of the testator's lands should descend to the heir at law, or pass over to the *residuary devisees* as not disposed before, because *John Paine*, one of the *five devisees*, died in the life-time of the testator, and by consequence it could not pass to him; but it seems plain, that it shall pass to the *residuary devisees* by the last clause of this will, because at that very time when it was made, it was not disposed to any other person whatsoever; for it was then the Econtra.

Term. Pasch. 9 Georgii, 1723.

the estate of the testator, and could not be the estate of *John Paine*, because he was then dead; therefore it must necessarily pass by the last clause of the will, as the *real estate* which the testator then had, and which he had not disposed before.

As to the word *other*, it is restrained to that very clause by which the testator devised his chattels, and cannot refer to a devise of his *real estate* of any kind whatsoever, because it was a devise to the residuary devisees and *their heirs*; now it had been in vain for the testator to have mentioned the word *heirs*, if he had not intended the lands should pass to them.

And as to such intention, it may reasonably be collected out of the words of this will, that he did intend they should pass; for otherwise he might easily have worded the clause in this manner, (*viz.*) *And all other my real and personal estate not before-mentioned,* * P. 126. *instead of, not before * disposed*; so that his intention seems to be, that if by any accident interposing his lands should not pass to the first devisees, then they should pass over to the second devisees, as a *residuum* not before disposed.

And though probably a lawyer might have used other words than the testator had done in this will, yet that is not to be considered where his *intention* is so plain; for if the form is not good, yet his *intention* being clear, that will help the form; but in this case the whole will is good and formal, and there is no room to object that it is not so.

It is true, it was objected by the counsel for the plaintiff, that it is absurd to say, that after the testator had devised his lands to one in fee, that they should go over to another; but this is misrepresenting the case; for it is no otherwise to go over than in case any accident should happen, that they should not pass to the first specific devisee; as if the testator should devise a particular sum of money to one, and all the rest of his personal estate to another, and it should happen that this particular legacy could not pass to that legatee, shall not the *residuary legatee* have it before the executor? certainly he shall, and yet in that respect the executor hath the same right to chattels as the heir hath to lands; and as for cases there are none in point.

Curia. An executor hath not the same right to the personal estate as the heir at law hath to lands, because an executor is no more than a trustee made by the testator, (a) but an heir is to sit in the seat of his ancestor.

(a) S. P. record. in Carth. 458.

See Chan. Pre.

90. by Ld.

Chan. Mac-

clesfield.

Chan. Prec.

547. by L. C.

J. Trevor.

11 Mod. 162.

But as to the principal matter, if a particular estate for life had been devised to *John Paine* (who died), remainder over, such a remainder had been good, and so is *Perkins* 108. b. 109. a. and so should this; and there is no objection against it, but that it doth not appear in the will, that the testator had any thing to dispose, he having devised all his lands before by the first clause in his will, to five persons and their heirs: No judgment was given.

from the misreport of the counsel for the plaintiff. The
in Underwood, which is shortly cited in 2. Blackst.
Rep. 736. it appears from that Lord in this case of
Goodnight v. Oppie Lord Ch. J. Pratt & Judge Powell
were for the heir & the Judges Fortescue & Eyre
were for the residuary devisee, but that the two
latter afterwards changed their opinions, the
former namely, Fortescue in Wright & Horne,
& Eyre in Roe & Gladd.

* The King *versus* Mayor and Burgesſes of Tre- * P. 127.
gony, &c.

UPON a *mandamus* directed to the *mayor and burgesſes* of Tre-
gony, to chooſe a mayor, and ſwear him into that office, they
return that the *borough of Tregony* was incorporated by letters patent
of King James the Firſt, by which it was provided, that the mayor
and burgesſes ſhall for ever after proceed to elect a new mayor on the
Tuesday next after Michaelmas-day every Year, and that the new
mayor thus elected, ſhould be ſworn by the mayor in being before
he went out of his office, and that every mayor ſo choſen ſhould
continue in that office till another was duly elected in manner as
aforeſaid; and they farther returned, that the day of election ap-
pointed by their charter being paſt, they could not proceed to a new
election, unleſs on the death or removal of the preſent mayor, &c.

Mandamus,
&c. to chooſe
a mayor, and
a peremptory
Mandamus
denied.
Ante 111.

It was inſiſted for a *peremptory mandamus*, that they might pro-
ceed to a new election, though the day for that purpoſe appointed
by their charter was paſt, becauſe that day was only directory; for
if the mayor ſhould be ſick on that day, or out of town, yet they
might proceed to elect a new mayor at any other time.

There is a caſe in * *Rolls*, which was in *Eaſter term*, 8 Car. in * *Roll: Abr.*
B. R. between *Hicks* and the town of *Lanceſton* in *Cornwall*, where ⁵¹⁴
it was held, that if the King incorporates a town by the name of
mayor and eight aldermen, with a clause in the letters patent, that
upon the death or removal of any alderman, it ſhall be lawful for
the mayor and the reſt of the aldermen *within eight days after ſuch*
death or removal, to elect another alderman in his place; in ſuch caſe,
though no election be *within the eight days*, yet they may chooſe
another at any time after, becauſe they have ſuch a power as inci-
dent to the corporation created; and that affirmative power which
they have by the charter itſelf to chooſe *within eight days*, &c.
doth not take away that power which they have by implication as
incident to the corporation.

On the other ſide it was argued, that there being no exception *Econtra*
taken to this return, it muſt therefore be agreed, that it is good; and
as to the other point there cannot be an election, but on the very
day appointed by the charter, unleſs upon the death or removal of
the mayor.

* In theſe caſes of *mandamus*, they are uſually granted to fill up * P. 128.
the body incorporated, for the ſake of the inheritance and ſucceſ-
ſion; but here the corporation is full, ſo there is no occaſion of
going to a new election of a mayor; now it being returned, that the
day of election appointed by their charter being paſt, they cannot
proceed to a new election, unleſs on the death or removal of the
preſent

Term. Pasch. 9 Georgii, 1723.

* 9 Annæ,
cap. 20.

present mayor; if this is not true, then it ought to have been * traversed on the other side, and the mayor and burgessees might have taken issue, or have demurred; and upon a verdict or judgment on the demurrer, they might have damages and costs as in an action on the case; and there being neither a traverse or demurrer to this return, this is a good answer why no peremptory *mandamus* shall go.

Then it was objected to this first writ of *mandamus*, (*viz.*) That it was not well directed; for it was to the *mayor and burgessees, to elect and swear* a new mayor; whereas the power of administering an *oath* is in the mayor only.

It is true, a *mandamus* is not to be superseded without a return first made, because by a return, the fact ought to appear judicially before the court; but where there is a return, as in this case, and it appears that the writ is wrong directed, in such case it ought to be quashed.

The difference is very plain between a writ to elect and a writ to swear another into an office; for the one may be directed to the whole body corporate, but the other must be directed to him alone who hath power to administer an oath, and no body can have that power, but by special words from the King; therefore this *mandamus* cannot be good, because the execution thereof would subject the person executing it to an information, for usurping an authority where he had none.

Curia.

Here are two objections made to this *mandamus*, (*viz.*) That the writ is not good, and that the *corporation* cannot proceed to choose a new mayor on any other day, than the very day appointed by the charter.

The objection to the writ is, that it is directed to the *mayor and burgessees to elect and swear a new mayor*, which is wrong; for tho' the mayor and burgessees are to elect, yet it is the mayor alone who must administer an oath to the person, for the burgessees cannot; therefore this direction is wrong.

* P. 129.

But this may receive a very plain answer by a reasonable construction of the matter *distributively* in the manner as directed by the writ, the words being *eligitis & juretis* * *secundum auctoritatem vestram*, so that it is a writ to the body corporate to elect, they having the inheritance as to the election of a mayor; and it is a writ to the mayor, who hath a special power to swear the person elected into the office, so that *reddendo singula singulis*, the writ is well directed.

And it could not be otherwise, unless there had been two writs granted, the one to elect, and the other to swear the person elected, so that this being a ministerial writ, is so far good; it is true, all to whom the writ is directed are to do something, (*viz.*) They are to elect, and to be present when the person elected is to be sworn; and there is no material difference between one man being sworn by another, and being sworn in the presence of another; so that those

who.

Term. Pasch. 9 Georgii, 1723.

who are present when the new mayor is sworn may so far be said to have a power to swear him, for the mayor himself doth no more than being present, it being usual for the *town-clerk* to administer the oath.

So that the chief question in this case is, that where a certain day is appointed by the charter for the mayor and burgeses to proceed to the election of a new mayor; and that day being past, whether they can elect on any other day in that year; and the court was of opinion they could (a) not, unless upon the death or removal of the mayor in being; for if they should elect on any other day, it is not *secundum auctoritatem* given by the charter.

B.K.
See Rep. temp. Hardw. 27.
(a) But now
by stat. 11
Geo. c. 11.
s. 1. Where
the election

for mayors or other chief officers shall not be made on the days appointed by charter or usage, the corporation shall not be dissolved, or disabled from electing; but may meet together on the day after, and proceed to election.

And there can be no inconvenience, if they should stay till another day appointed by the charter for them to choose a new mayor, because it is expressly provided, that the mayor elected shall continue in his office till another is duly chosen, which cannot be but upon the very day appointed, as aforesaid; for where they have no power by their charter to chuse on any other day, their corporation shall be dissolved rather than they should make an election on another day; and this court cannot compel them to chuse a mayor on any other day, where there is a mayor already in being.

So a peremptory *mandamus* was denied.

Waller's case.

THE court was (b) moved to stay proceedings on a *Sci. fa.* brought against the *bail*, there being a writ of error depending in the Exchequer-chamber.

Writ of error
depending in
the Exche-
quer-cham-
ber moved to

stay proceedings on a *Sci. fa.* against the bail.
bail on the *Sci. fa.*

(b) This must be before judgment obtained against the

* The rule in the case of *Myer* versus *Arthur*, upon a motion in * P. 130. this court in *Easter-term* 7 *Georgii*, was, that if the defendants in the *Scire facias* will confess judgment, and enter into a rule to pay the debt, or to deliver up the principal within four days after the judgment shall be affirmed, in such case the proceedings on the *Scire facias* should be stayed; and the Chief Justice was of opinion, that the like rule should be made in this case.

Curia.

It is true, the plaintiff in the *Scire facias* is to have judgment immediately against the *bail*, but he is tied up from suing out execution until four days after the judgment shall be affirmed, and then on non-payment of the debt, or not rendring the principal, he is at liberty to take out execution, and by this means expences would be saved on both sides.

Aldridge

Term. Pasch. 9 Georgii, 1723.

Aldridge *versus* Snowden.

See last case.

THIS was likewise a motion to set aside a judgment against the *bail* where the second *Scire facias* against them was returnable on the 13th day of May, and the writ of error was allowed on the same day, and notice given between 3 and 4 o'clock, the same day the bail surrendered the principal, and then judgment was obtained against the bail; and for an authority in point the case of *Myer versus Arthur* was cited, *Pasch. 7 Georgii*, where it was resolved by this court, that after a writ of error is brought on the principal judgment, the proceedings upon a *Scire facias* against the bail shall stay, and the bail shall have four days after the affirmance of the judgment, to render the principal, or pay the condemnation-money; and upon the authority of this case, a rule was now made for the plaintiff to shew cause, &c. why the judgment should not be set aside, and all further proceedings stayed.

And upon another day a motion was made to discharge that rule, because the bail ought to render the principal, &c. on the very day that the second *Scire facias* was returnable, otherwise the plaintiff must have judgment, and it ought not to be set aside.

It is true, the *bail* have brought a writ of error on the very last day allowed by law for them to render the principal, and gave notice thereof about three of the clock in the afternoon, but did not

(a) Quære, if they did not surrender the principal on the very same day, and even before judgment signed; but however, it is certain that the surrender could not be made till after the regular time allowed for that purpose was expired; because otherwise this motion had been needless.

* P. 131.
Reason for
the bail.

* The counsel for the bail likewise cited *Myer* and *Arthur's* case to prove that they ought to be discharged, for in that case the second *Scire facias* was returnable 13 February, which was the last day of *Hillary term*, and notice given, that a writ of error was allowed two days before; and the plaintiff intending to proceed on the second *Scire facias*, was stopped upon a motion.

It is true, the render of the principal on the day the second *Scire facias* is returnable, would be too late, if the writ of error did not help it; but that being brought before the return of the second *Scire facias*, the bail hath time till four days after the affirmance of the judgment.

To which it was answered, that this judgment was regular, and though, if the *bail* had come before the return of the second *Scire facias*, and moved the court that proceedings might be stayed against them, there might have been some indulgence; but when they did
not

Term. Pasch. 9 Georgii, 1723.

not make any application till after the judgment was signed, it ought not now to be set aside.

" *Pratt* Ch. Just. Application to stay proceedings against bail, by reason of a writ of error brought by the principal, ought to be made before judgment signed; for such writ of error of itself is no *superfedeas* to the proceedings against the bail. However on the circumstances of the case, since notice was given of the allowance of the writ of error, I think in reason and equity the judgment ought to be set aside paying costs. *Myer v. Arthur*, Stra. 419. P. 7 G.

" The bail may surrender the principal at any part of the day of the return of the second *Scire facias*.

He was of opinion, that it was necessary to move the court to Curia. stay proceedings; and if they could be stayed upon a motion, then if the defendants paid costs, and the plaintiff was put in as good a condition as if the motion had been made in time, the court may stay the proceedings, though the motion was made out of time, and the rather, because it is against the bail, who ought to be favoured as far as possible.

" *Fortescue* Just. Such surrender on the return day of the last *Scire facias* must be made *sedente Curia*. This judgment against the bail is strictly regular, and ought not to be set aside. The staying the proceedings against the bail, when the principal brings a writ of error, is merely an indulgence of the court, even when the bail move in time. All the proceedings are past, for judgment is obtained. This case differs from the common motion to stay proceedings on the bail-bond; for that is never granted but by making the plaintiff secure of his debt if he recovers: for the judgment on the bail-bond stands as a security for the debt. When Proceedings against bail are staid on a motion made in proper time, if the judgment is afterwards affirmed, the bail are allowed four days to surrender the principal after such affirmance.

" Then the court made a proposal to set aside the judgment, if the bail would be bound to pay the debt absolutely (without an election to pay the debt or surrender the principal) if the judgment should be affirmed.

" Which not being agreed to, the rule for shewing cause was discharged.

Term. Sanct. Trin.

Anno 9 Georgii, 1723.

The King *versus* Alexander John.

Information
in nature of a
Quo warranto
for usurping
the office of
mayor.

UPON a motion in *Trinity term* last, a rule was made for the defendant to shew cause why an information in the nature of a *Quo warranto* should not be granted against him, to shew by what authority he claimed to be *mayor of Lestwithiel* in the county of *Cornwal*.

And in *Hillary term* following this cause was shewn, (*viz.*) That by the charter of incorporation, a mayor is always to be elected out of the capital burgeses, and to continue in his office till a new mayor is duly chosen; that the defendant, who is the present mayor, was never a *capital burges*, and consequently could never be duly chosen mayor out of those burgeses, and therefore is no mayor.

The answer was, That he was chosen a capital burges in the year 1697, and that as many of the inhabitants as are now living saw he was duly elected, excepting one *John John*, who now complains against him, and that having so long acquiesced under that election, it shall not now be brought in question, it being a standing rule in cases of this nature, that they shall not be examined in such remote degrees; for if they should, then they might enquire whether the defendant was a freeman before he was a burges, and whether he was a burges before he was a capital burges, which would be very inconvenient.

* That the defendant was chosen mayor in the year 1706, and that the corporation for some differences arising amongst themselves, did not proceed to any election of capital burgeses since that time, so that this borough wanted a sufficient number of such burgeses to elect a new mayor, and for that reason the defendant had continued mayor ever since.

Curia.

(a) By the
stat 9 Ann.
cap. 20. No

The Chief Justice was of opinion, that the fact was plain, that the defendant had been mayor of this place for (a) sixteen years together, which is a sufficient cause for an information, so that the person who hath or shall be in an annual office for one year, shall be chosen into the same office the next year, &c.

rule

Term. S. Trin. 9 Georgii, 1723.

rule was made absolute, and the parties were left to try the right upon this information; though one of the Judges was of opinion, that a *mandamus* to elect a *capital burghess* and a mayor, had been a good and proper method.

Afterwards a trial was had upon this information, and a verdict was found for the plaintiff; and now it was moved to set it aside, and for an attachment against *John John*, for not producing the corporation-books at the trial, according to a rule of court made for that purpose, with which he was served.

As to the first part of this motion, (*viz.*) To set aside the verdict, the court took time to consider it, and that *Justice Fortescue* would in the mean time consult with *Baron Price*, who tried the cause, and report his opinion, who afterwards informed the court, that he had spoke with the Baron, whose opinion was, that the verdict was not against evidence, but that the proof was only by one witness, that the defendant was a *capital burghess* duly elected, and that the evidence that it was not a due election was given by *John John* only, and no more, and that it was objected against his evidence at the trial, but the objection was over-ruled, and he (the Baron) was satisfied with the verdict.

However, it was moved for a new trial, upon a suggestion that this *John John*, who was the only witness against the defendant, kept the corporation-books from him, so that they could not be produced at the trial, he being served with a rule of this court to produce them; and it was farther moved, that an attachment might be granted against him for a contempt; and it was insisted, that if this verdict should stand, a great inconvenience must necessarily follow; for it would avoid all the acts of this corporation ever since the defendant had been mayor; for if he was not a lawful mayor, then all the corporate acts done by him are void.

* The counsel on the other side argued, that this was a good verdict, and given upon good evidence, and ought not to be set aside, or a new trial granted, because the judge who tried the cause was satisfied with the verdict, and reported that it was given on good evidence; and that to argue a right from the long possession of this office, when that right had been tried upon an information, and found against the defendant, that he had no right, was a new sort of defence, and a very strange one too. Econtra. * P. 134.

It is true, the *possession* might be given in evidence, that he had a right to vote as mayor, &c. because every officer *de facto* hath such a right; but certainly his *right to the office itself* can never be determined upon a trial of his right to vote as mayor.

It is true, there was a rule made for this *John John* to produce the corporation-books at the trial, but as to that matter he hath positively made oath, that he hath not those books, and that he doth not know who hath them, and therefore he shall not be in contempt without a wilful default.

Curia.

There is no room for an attachment, because this person hath not disobeyed the rule, and a new trial shall not be granted, because that would be against the report of the judge before whom this trial was had, who was satisfied that the verdict was not against evidence; so that nothing is offered for a new trial, but only that the long continuance in the possession of this mayoralty supposeth, that the defendant had a right to be mayor, and the inconveniency, if he was not mayor, would be to avoid all the corporate acts done by him as mayor for many years last past.

It is true, if the question had been at the trial, whether the defendant had a right to vote, or not, or whether he had taken the oaths or received the sacrament within the time limited by the statute, in such case his being mayor *de facto*, and a long acquiescence under such a mayoralty would be a strong evidence for him; but when the question only was, whether he was duly elected into that office, that is a question concerning the right, and in such case the long possession of the mayoralty, or the many inconveniencies that would follow if he was not duly elected, ought not to be regarded.

So that this verdict being given on good evidence, and so certified by the judge who tried the cause, shall not be set aside for any * P. 135. of the reasons before-mentioned; and thereupon * the rule was discharged, against the opinion of Justice Fortescue, who was for the possession.

The King *versus* Harrison.

Information
in nature of a
Quo warranto
against a
steward of a
leet for im-
panelling a
jury not duly
summoned.

THIS was likewise a motion for an information in nature of a *Quo warranto* against the steward of a court-leet, and against the bailiff and the constables for impanelling a jury not duly summoned, the bailiff being the proper officer to summon them, who should be all *freeholders*, for they only have a right to be jurymen, but there were none summoned, and six other persons who had no right being present in court, were sworn of the jury, and six *freeholders* being likewise in court, refused to be sworn, because they were not summoned, neither would they serve with those who had no right to be of the jury, whereupon the steward swore six more; and the jury thus constituted by the steward, of twelve persons who had no right to be jurymen, chose the bailiff and constables; this being the fact, a rule was made for the defendant to shew cause why an information should not go against him.

And now he shewed for cause, that the *six freeholders* who appeared in court were duly summoned, but that they refused to be sworn of the jury; whereupon the steward swore a jury out of such persons who were present in court, which he insisted was a good election, which jury chose the two constables and one bailiff of the manor, and that this was the constant course of choosing such

such officers; and that it would be dangerous to make a precedent of trying the right of chusing such men by a *Quo warranto*.

Here is no room for any complaint against the *constables* or *bailiff*; Curia. but if any, it is against the *steward*, and therefore a rule was made for him to attend, and to shew cause why an attachment should not go; and the rule for the rest was in the mean time enlarged.

The King *versus* Athos, Father and Son.

THIS cause began in *Hillary term* 9 Geo. The Attorney General moved in *Easter (a) term* last for an *Habeas corpora* directed to the gaoler of the common gaol in the county of (b) *Pembroke*, to remove the bodies of *Thomas * Atho* the father and *Thomas Atho* the son, from the gaol in (c) *Pembroke* to the keeper of the gaol in the county of *Hereford*, that being the next *English* county to *Pembroke*, and likewise for a *certiorari* to be directed to the proper officer to remove the indictment found against them in *Wales*, and to the coroner of *Pembrokeshire* to remove the inquisition taken by him upon the view of the body of *George Martin*, who was murdered by the father and son in a barbarous manner, and for which an indictment was found against them in *Wales*.

* P. 136.

Indictment for murder removed out of Wales, and tried in an English country.

Stra. 553.

(a) The first motion was in Hil. 9 G.

The reason given was in order that they may receive their

trial in the county of *Salop*, the next English county, according to the statute of 26 H. 8. c. 6. sect. 6. Lev. 118. Mod. Rep. 64. The county of *Pembroke* was formerly one of the antient Welsh counties.

Cur. By virtue of that statute we may grant such *certiorari*: and we are also warranted by former precedents on Mr. Harcourt's search, as *Rex v. David Davies*, 3 Car. 1.

(b) There was no rule in com. *Pembroke*, in *Easter term*, but only in com. *Hereford*.

(c) See Lev. 118. Mod. Rep. 147.

On motion to set aside the former rule, it was said, that Mr. Attorney founded his motion upon the statute 26 H. 8. by which it is enacted, that justices of peace and of gaol-delivery in the counties next adjoining to *Wales*, where the King's writ runneth, may hear and determine all felonies, and their accessaries, committed in *Wales*, or the marchers thereof; but this clause extends only to lordships marchers, and not to any of the antient counties in *Wales*.

Econtra: 26 H. 8. cap. 6.

Besides, the aforesaid statute was altered about eight years after it was made; for by the statute 34 & 35 H. 8. by which *Wales* is divided into twelve counties, and Judges appointed to keep their sessions in the said counties, it was enacted, that those Judges might hold pleas of the crown in as large a manner as the Judges in *Westminster-hall*, and that they shall enquire, hear and determine all criminal offences whatsoever committed within their several limits, and administer common justice to all the King's subjects there, according to the laws of *England*.

34, 35 H. 8. cap. 26: s. 6.

So that by this subsequent statute the defendants shall not be put to their trial elsewhere, but only where the fact is supposed to be committed, which in this case was in *Pembrokeshire*; if it should be

Term. S. Trin. 9 Georgii, 1723.

otherwise, then all criminal cases which the Judges in *Wales* have power to hear and determine by the statute last mentioned, would be removed to *England*, where he who is poorest, either the prosecutor or the criminal, must suffer for want of money to bring and support his witnesses in an *English* county.

It might be for this reason, that a criminal indicted in *Wales* ought to be tried there.

The court took time to consider these statutes, and declared, that if it was in their power, they would grant the motion made by Mr. Attorney, because it was very difficult to have justice done in *Wales*, by a jury of *Welshmen*, for they are all related to one another, and therefore would rather * acquit a criminal than have the scandal, that one of their name or relations should be hanged; and that to try a man in *Wales* for murder, was like trying a man in *Scotland* for high treason, those being crimes not much regarded in those respective places.

And at another day the court declared, that it would be better only to grant the *habeas corpora* without the *certiorari*, for if both should be granted, it would delay the prosecution, because if the indictment and inquisition should be removed, they come both into court the next term, and not before; and they must both be sent down by *mittimus* to the next assizes in *Hereford*, which would not be till *March* following, so that the defendants could not be tried before that assizes; but if the Attorney General would enter a *nolle prosequi* as to the indictment already found in *Pembrokeshire*, then the defendants might be indicted again for the same fact in *Herefordshire*, and tried at the summer assizes, which would be the best and the most speedy method.

(a) Quære, whether this hab. corp. removed them immediately from Pembrokeshire gaol to Hereford gaol, or whether they were first brought up hither.

Thereupon a *nolle prosequi* was entered, and an (a) *habeas corpora* granted, and the defendants were indicted and tried in the county of *Hereford*, and both found guilty of murder; but because their counsel insisted, that this was a *mistrial*, the judge who tried the defendants would not give sentence to execute them.

Whereupon the Attorney General moved in the beginning of *Easter* term, 9 Geo. for an *habeas corpora* to bring up their bodies to the court, that they might receive sentence of death, and for a *certiorari* to remove the record, so that the court might have all before them to give judgment; all which was granted.

And accordingly about a fortnight afterwards, both the father and son were brought to the bar, and their counsel objected, that their trial in an *English* county, and by a jury of *Englishmen*, was a *mistrial*; for if it was good, it must be by virtue of the statute 26 H. 8. as aforesaid; but it could not be good by that statute, because it extended only to those counties which were *lordships marchers*, and not to any of the *antient* counties in *Wales*, of which *Pembrokeshire* was one, and there were seven more, (*viz.*) *Glamorgan*, *Caermarthen*, *Cardigan*, *Flint*, *Caernarvan*, *Anglesea* and *Merioneth*; it is true

true by that statute, it is enacted, That the *justices of gaol-delivery in the counties next adjoining to Wales, where the King's writ runneth, shall hear and determine felonies, and their accessaries committed in Wales, or the marchers thereof; and that an acquittal of felony in any * lordship marcher shall not be a bar for any person indicted for the same within two years next after such offence committed, so that it* seems plain this statute relates only to the *lordships marchers*, who claimed several privileges, as to acquit criminals upon payment of fines, &c. which was never claimed in any of the old counties. * P. 138.

On the other side the *Attorney General* insisted, that all *Wales* was comprehended by that statute 26 H. 8. and it is so explained to be by a subsequent † statute made in the same King's reign, by † 34 & 35 H. 8. c. 26. which *Wales* was divided into twelve counties, whereof eight were declared to be the antient counties as before-mentioned, and four other were made by the statute 27 H. 8. cap. 26. (*viz.*) *Radnor, Brecknock, Montgomery and Denbigh.*

But at the desire of the prisoners, they had counsel assigned to argue that point, and afterwards one of their said counsel moved for a copy of the writ of *habeas corpora* by which the prisoners were removed from *Pembroke* to *Hereford*, and likewise for a copy of the *certiorari* by which the record was removed, if any such there was; and if not, then for a copy of the order by which they were brought to *Hereford*, be it what it would, so that they might have the whole proceedings before them; but this motion was not granted, but the prisoners had a copy of their record.

And the case being appointed to be argued this term, *Kettleby* For the prisoners. counsel for the prisoners insisted, that their trial in *Hereford* for murder committed in *Pembrokeshire*, was against a fundamental principle of the common law, which appoints that all trials shall be *per pares*; and that by neighbours upon a presumption that *vicini acta vicini cognoscuntur*; so that this must be a *mistrial* at common law.

This is a cause of very great consequence to the principality of *Wales*, because if a fact committed there might be tried in an *English* county, then the richest man will always bring his cause to be tried there; and as it hath been already observed, the *poor* man must suffer for want of money to carry all his evidence thither, either for his defence, or to prosecute another; and no persons are so well able to judge of the truth of what is sworn, as the *neighbours* of a witness to whom he is known, so that by this means a powerful and rich man may procure such evidence as to have credit where they are not known, when the same persons might have no manner of credit by them who are their neighbours.

* It must be admitted, that such a trial could not be at *common law*, neither is it allowed by that statute 26 H. 8. as they would insinuate on the other side; and this may appear upon the reason of making that statute, which was as followeth: * P. 139.

¶ In

ff. In former ages, when the *Britains* were drove out of *England*, and retired amongst the mountains in *Wales*, they would frequently make inrodes in a hostile manner into *England*, their native country, to prevent which, the Kings of *England* gave large tracts of lands to some of their most powerful subjects on the borders, and these were called *lordships marchers*; and such lands which the Kings kept on those frontiers, or which reverted to the crown by forfeitures, or otherwise, were called the King's *lordships marchers*.

But afterwards these *lords marchers* pretending to some extravagant privileges, without any manner of right, therefore this statute was made to curb them, and it was calculated for that very purpose; this plainly appears by another * statute made the very next year, by which *Wales* was incorporated, united and annexed to *England*, and that all persons born in *Wales* should enjoy the same liberties as the *English*, and that the laws and statutes of this realm, and none other, should be had, used and executed in *Wales*, and divers *lordships marchers* were by this last statute united to *English* counties, and others to *Welsh* counties, and the residue were divided into new and particular counties by themselves, and those were *Brecknock*, *Radnor*, *Montgomery* and *Denbigh*; so that the eight old *Welsh* counties are not within that act, but only those four counties which were cut out of the *lordships marchers*.

It is true, there have been several attempts made to bring trials from those old counties to the next *English* counties, but such attempts never yet prevailed; yet so far they have gone as to obtain *certioraries* to remove indictments taken in this very county of *Pembroke*, because those are declarations for the King, which he may remove where he pleases; besides, the court of King's Bench hath been formerly of opinion, that they had power to remove indictments out of those counties, to see whether they were good, and that they might quash them if they were not; but that if they were good, then to remand them back by *mittimus* into the proper counties by virtue of those very statutes; but * the Judges were not resolved, that indictments thus removed could be tried in the next *English* county; yet after several arguments at bar, *anno* 31 *Eliz.* Whether a *certiorari* would lie to remove an indictment out of *Caernarvan*, or not, the court would not determine it, and therefore that indictment was tried in the proper county; and wherever an indictment was removed, there is a *quare* how the court must proceed upon it; and in * *Chedle's* case, which happened *anno* 9 *Car. 1.* which was an indictment for murder found in *Anglesea*, and a *certiorari* granted to remove it; the court declared that they were not yet resolved, that it could be tried in an *English* county; and my Lord Chief Justice † *Vaughan*, who was a native of *Wales*, and may for that reason be presumed to have studied the law relating to that country, was of opinion, that this statute 26 *H. 8.* related only to the four counties taken out of *lordships marchers*.

* 1 Roll. Abr. 394.
Cro. Car. 331.
See 1 Lev. 118. The King v. Thomas.
† Vaughan's Rep. 413.

Term. S. Trin. 9 Georgii, 1723.

The words of that statute upon which this question doth arise, are, (*viz.*) That the offence shall be tried *in the next English county adjoining to the lordships marchers, or other part of Wales*, where it was committed.

Now it is to be considered, that *Wales* was originally a kingdom of itself, afterwards a principality, and subjected to *England* by King *Edward I.* anno 1282. and afterwards by the statute of *Rutland*, it was provided in what manner civil and criminal causes should be tried there; and there is a clause in the statute 27 H. 8. by which *Wales* was incorporated to *England*, that the said statute should not extend to derogate from any other act before that time made for the trial of murder or felony committed in any *lordship marcher*, or in any county of *England* next adjacent thereunto, which is an evident proof, that the statute 26 H. 8. did not include all *Wales*.

As to that clause, (*viz.*) That *such offences shall be tried in the next English county adjoining to the lordships marchers, or other part of Wales* where they were committed, there the word *such* is a relative; and it is in the enacting part of the statute, and therefore must refer to some antecedent, which must be to some crime mentioned in the preamble, and the words *other part of Wales*, where the offences were committed, must be intended other parts, which were neither within the lordships marchers, or within the old counties.

* It is the opinion of my † Lord Coke, that all statutes ought * P. 141.
to be interpreted, so as the innocent may not suffer; and that to † Co. Lit. 11.
construe an act *by itself*, is the best sort of construction, because it is Hob. 310.
ex visceribus causæ; but if this act should be construed, as the prosecutors would have it, then it would take away all jurisdiction from *Wales*, and make the statute itself of no effect, for it would be absurd and inconsistent to exclude all *Wales* from a jurisdiction of trying offences by removing the indictments into *English counties*, when this very statute expressly gives a jurisdiction to part; for it provides, That all felonies, and their accessaries, committed in the county of *Merioneth*, shall be enquired, heard and determined in the counties of *Caernarvan* or *Anglesea*, before the justice of *North-Wales*, or his deputy, and by an inquest of *Caernarvan* and *Anglesea*.

Besides, by the aforesaid statute of incorporating *Wales* with 27 H. 8.
England, it is enacted, That all persons born there shall enjoy all cap. 26.
liberties as other subjects of *England* do enjoy; and it is certainly a very valuable liberty and privilege for a man to be tried by his equals and neighbours, which privilege hath been enjoyed by the *Welsh* ever since the making that statute, which is now above 100 years; and during all that time there is no instance to be given of removing any trial from either of the old *Welsh counties*, to be tried in an adjoining *English county*; and it would be very hard to make a precedent for that purpose after such a length of time.

Exception to
the record.

Then it was objected against the record, (*viz.*) To the indictment on which the prisoners were tried, the caption whereof was That the grand jury (naming them) were *jurati & onerati ad inquirendum pro corpore comitatus Herefordiæ*, which must be of something arising within that county; but here the fact did not arise in that county, but in *Wales*.

“ *Cur. contra.* This is the constant form in indictments for
“ foreign treasons or felonies: and there is no difference, though in
“ the last case the offence in the indictment is laid to be committed
“ in that county where the inquiry is; for the statute of 26 H. 8.
“ c. 6. s. 6. has declared that these offences shall be inquired of in
“ the *same manner and form* as if the same had been committed
“ within the said shire.

Econtra.

It was argued on the other side, that though it was the fundamental rule of the common law, that trials should be had *per pares & de vicineto*, yet that rule will be of no weight when the manner of trials is altered by act of parliament, as it was in this case, and that upon due consideration and for the advancement of justice.

* P. 142.

Now as to this statute, upon which the present question doth arise, it is as full as words can express it, that * the trial of a fact committed in *Wales* may be in the next *English* county; for by the plain and positive words of the act, all *Wales* is included; it is true, the *lordships marchers* are often repeated in this (a) statute, and from thence it is inferred, that it was made to redress such abuses which were committed there.

(a) 26 H. 8.

But it is plain, that this is a remedial law, and made to redress all abuses, as well in every county in *Wales* as within the *lordships marchers*; and there are clauses in it which meet with every abuse, as well within the one as the other.

It is true, the *lords marchers* did pretend to have several privileges and immunities which were never claimed by the rest of the people in *Wales*, and therefore this statute (which was made for the remedy thereof) was penned with particular clauses to meet with those mischiefs; as where they pretended to a privilege, that none of the King's ministers should enter into their territories; and a privilege to pardon murders, and to acquit persons who had committed (b) capital offences upon paying fines, and that such acquittal should be a bar to any subsequent trial for the same fact; and therefore it was provided by this statute, that no acquittal in the *lordships marchers* should be a bar to a trial in an *English* county, if it was prosecuted within two years after such acquittal, which clause, though it is general in the statute, must be intended an acquittal by paying a (c) fine only; for this being a remedial law, was calculated to meet with all the grievances in *Wales*.

(b) See the
case of The
King v. Tho-
mas, Sid. 179.
pl. 15.
Keb. Rep.
621. pl. 97.
663. pl. 55.
677. pl. 70.
Lev. Rep.
118.

(c) So is the statute 34 & 35 H. 8. cap. 36. (*viz.*) None shall be put to his fine for murder or felony, but shall suffer according to the laws of England.

Term. S. Trin. 9 Georgii, 1723.

The statute 27 H. 8. which was made the very next year, complains of want of justice in *Wales*, which is a proof that the statute 26 H. 8. intended likewise all *Wales*, for *indefinitum æquipollet universale*; therefore this act intended all the old counties as well as the lordships marchers. 27 H. 8. cap. 5.

And farther, the statute 34 & 35 H. 8. recites all *Wales*, and in the said recital there are these words, (*viz.*) Though the statute 26 H. 8. was never put in execution in the counties of *Anglesea*, *Merioneth*, or *Caernarvan*, it shall be used as law in them as well as in *South Wales*, &c. 34 & 35 H. 8. cap. 36.

* Now *Pembrokeshire* is part of *South Wales*; it is true, no case comes up to the point now in question; but yet for the reasons before-mentioned, a trial in an *English* county for a fact committed in *Wales* is good. * P. 143.

In that case of *The King* and *Thomas*, the defendant pleaded *autrefois acquit* when he should have demurred to the jurisdiction; and the extrajudicial opinion of the Lord Chief Justice *Vaughan* in that case, is the only opinion against a trial in an *English* county, but it doth not appear what induced him to be of that opinion.

This statute 26 H. 8. appears plainly to be made to enlarge the King's jurisdiction, which was wanting in *Wales*, and for the advancement of justice; and therefore it ought to be construed, so that all the clauses therein may stand together, and not that one should make the other void, but should be expounded by each other, for such a construction is *ex visceribus causæ*, as well as a construction of the enacting part by the preamble.

Now in the enacting part of this statute, it is said, that justices of gaol-delivery in the counties next adjoining to the lordships marchers, or other part of *Wales*, may hear and determine all felonies and their accessories committed in *Wales*, or the marchers thereof, which words *other part of Wales* can never be intended (as insisted on the other side) *other part* thereof which was neither within the lordships marchers, or the old counties, because there is no part of *Wales* but what is within one of them.

And such counties there were ever since *Wales* was united to *England*, as appears by the statute 12 Ed. 1. called *statuta Walliæ*, where there are many good laws concerning the division of it into counties; and sheriffs were there, which shews that it must be then apportioned into counties.

It was the express judgment of the parliament, anno 34 & 35 H. 8. that offences done in those old counties might be tried in the next adjoining *English* county, by virtue of the statute 26 H. 8. aforesaid; for by that first statute it is appointed, that offenders in *Merioneth* may be tried in *Salop*, and so might those of *Anglesea* or *Carnarvan*, though the act 26 H. 8. was never yet put in execution there; yet by the aforesaid statute it was declared to be in force there, as well as in *South Wales*, which are general words.

So

Term. S. Trin. 9 Georgii, 1723.

So that by the said statute 26 H. 8. it was thought necessary to curb the insolence of the *lords marchers*, and to prevent an acquittal by paying a fine to be a bar to a prosecution * of a criminal in an English county for a fact committed in *Wales*, so as such a prosecution was commenced within two years after the acquittal.

* P. 144.

The Lord Chief Justice Vaughan admits, that an *exigent* and a *capias utlegatum* went into the antient *Welsh* counties ever since the reign of Ed. 1. though not into the *lordships marchers*; and the reason was, because they had no sheriffs in the said marchers; and as to the inconveniency of removing causes into *English* counties, there is none, as pretended on the other side, because the prosecutor is never allowed to remove the cause without good cause shewed; but the King may remove his cause at pleasure.

" Pratt Ch. Just. said, it seemed one of the clearest cases that ever was.

" And (*int. al.*) as to the case quoted from *Rol. Abr.* 394, 395. and *Cro. Car.* 331. The question there was only, Whether a *certiorari* would lie. We have granted one: and I think we are well enabled so to do; for *certioraries* will lie into *Wales*.

Curia.

All that can be said for the prisoners hath been fully urged by their counsel, but the court is bound by express and plain words in this act of parliament, the preamble whereof complains of great offences in *Wales*, which are general words, and comprehend all *Wales*; and in the enacting part it is declared, that the mischiefs were all over *Wales*, but greater in the *lordships marchers*, so that it is plain the parliament intended to give some remedy to the whole, that it might be adequate to the mischief, and meet it in as large a manner as possible.

W. Jones 164.
Palm. 485.

Now those general words in the enacting part, shall never be restrained by any words introducing that part; for it is no rule in the exposition of statutes to confine the general words of the enacting part to any particular words either introducing it, or to any such words even in the preamble itself; it is true, my Lord Coke commends a construction which agrees with the preamble, but not such as may confine the enacting part to it.

Cro. Car. 498,
533.
Wil. Rep.
320.
See Atk. Rep.
175, 182.

And of the same opinion was the Lord Chief Justice Holt in *Chambers's* case, who was tried here for a murder committed in *Barcelona* in *Spain*, who said that trial was good by virtue of the statute 33 H. 8. c. 23. though the case was not within the mischief recited by that act.

" Eyre Just. The same resolution was given about two years ago in the case of *Rex v. Elym* at the Old Bailey.

" And per Fortescue, The like construction was made of the act of 13 & 14 Car. 2. c. 12. s. 21. *Rex v. Inhab. de Rufford* 8 G. Ante 39.

" He said he was persuaded this jurisdiction would be sparingly executed, and never unless the justice of the cause required it; therefore

“ therefore it will not be a consequence, that no felon will be ever
“ tried in the *proper* county in *Wales*.

So that upon the whole it must be admitted, that a preamble may be a good expofitor of a statute: but what was offered on the other fide is not properly a preamble, but only introductive to an enacting part of the statute; besides, there was a time when there were no preambles to acts of parliament, and yet they were good; and even at this time preambles are no more than recitals of inconveniencies, which do not exclude any other to which a remedy is given by the enacting part.

* It is true, there is an extrajudicial opinion of my *Lord Vaughan*, * P. 145. against such trials in an *English* county; but he being a native of *Wales*, might be prejudiced in favour of his country, and his notes were never revised or designed by him to be printed.

As to the objection, that part of *Wales* is entrusted with trials of facts arising there, as that an offence in *Merioneth* shall be tried in *Anglesea*; and therefore it would be inconsistent to say, that the jurisdiction should be taken from the whole when it is expressly given to part; the answer is, that no jurisdiction is taken from *Wales*, because this statute gives the King only a concurrent jurisdiction to have the criminal tried in the next *English* county at his election: and the reason is plain, for the *Welshmen* had usurped privileges to which they had no manner of right; therefore these statutes shew that they deserved correction, and in the enacting part *all Wales* is included as well as the *lordships marchers*; so likewise where it is said, that if *jurors in Wales* (which words include the whole) did not act according to evidence, they should be punished by the president and judges by fine, &c. which is such a severe check upon juries, that it would never have been enacted without some piece of injustice or partiality notoriously known and represented to the parliament in those days.

It is admitted that there is no precedent in point for such trials in an *English* county, but the reason may be, because that statute 34 & 35 H. 8. tells us, that the laws were not put in execution; and for these reasons, by the opinion of the whole court, it was adjudged that this was a good trial.

Whereupon the court ordered, that the prisoners should be brought up on another day to receive sentence, and accordingly they being brought to the bar, it was moved in arrest of judgment, that the court could not proceed to give sentence, but ought to be remanded into *Herefordshire*, to receive judgment at the assises, because by this statute that power is given to the judge of assise who tried the cause, and to him only; but upon reading the statute, the words were, (*viz.*) That the prisoner should be tried and condemned, as if the fact had been committed in the next *English* county; and certainly this court might pass sentence on a criminal convicted in an *English* county.

Term. S. Trin. 9 Georgii, 1723.

So that motion was over-ruled; and thereupon sentence was
* P. 146. given, and a rule (a) of court was made to the marshal of the
See Vent. 93. King's Bench to execute the prisoners on * Friday the 5th day of
(a) This rule July, who accordingly did execute them at the common (b) gallows
was made die in the county of Surrey.
Sabbati, prox.
post octab. Trin. 9 Geo. (which was the second Saturday in that term.) (b) Quære, if it was not
at St. Thomas's a Waterings. See Stat. 553.

The King *versus* Burnaby.

Certiorari not
granted to re-
move an in-
dictment for
murder out of
Wales.

UPON a motion for a *certiorari* to remove an indictment for
a murder committed in *Anglesea*, upon an *affidavit* that the
prosecutor feared some partiality in *Wales*; and therefore that it
might be tried in the next *English* county, for the defendant was
bailed, and had made some valuable presents to the gentlemen of
that county, as the prosecutor was informed by his solicitor: there-
upon a rule was made for the defendant to shew cause why a *cer-
tiorari* should not go.

And at another day it was shewed for cause, that if trials should
be removed out of *Wales* into the next *English* counties upon such
uncertain allegations, there could never be any trials there. And
first, as to saying he was bailed; that could be no reason for the
prosecutor to fear any partiality; for the defendant was bailable by
law, because by the coroner's inquest, the fact was only found
chance-medley: and as to the presents made to the gentlemen of the
county, the *affidavit* was only, that he was told so by his solicitor,
who probably might tell him what was false; therefore he ought to
make a positive oath of that matter, otherwise a *certiorari* shall not
be granted.

Besides, in this case both the prisoner and the deceased were na-
tives of *Holland*, and had no manner of interest in *Wales*; so that
there is no colour to fear any partiality, but that justice will be
equally distributed.

Curia.

Where there is a just reason to induce the court to believe par-
tiality will be shewed on either side, there the indictment shall be
removed into an *English* county: but the truth of that matter will be
suspected, where it is upon the motion of either the prisoner or
prosecutor, and in such case there must be a full and clear *affidavit*
to induce the court to grant a *certiorari*; but where it is at the in-
stance of the Attorney General in behalf of the crown, it shall be
granted without an *affidavit*; therefore this rule shall be set aside for
want of a sufficient *affidavit*, but the prosecutor shall have leave to
move it again upon a better.

* Belt

* Belt *versus* Collins.

* P. 147.

A Writ of error *coram vobis residen.* was brought on a judgment given in B. R. and the question was, whether it was a *superfedeas* before it was allowed by the court.

Writ of error
coram vobis
residen. is a
good *super-*
fedeas after
it is allowed.

It was argued that it was not, because this writ was different from other writs of error, for it is only that the judges would review their own judgment; and being sued out of term, it is no *superfedeas* without allowance by the court in term-time.

Neither is any other writ of error a *superfedeas* before it is allowed, because it is taken out of one court to reverse the judgment of another; and he who takes it out may keep it in his pocket without giving notice; for which reason it would be very inconvenient if such a writ of error should be a *superfedeas*.

It was said on the other side, that this is as good a *superfedeas* as if the writ of error had been sued out in term-time, for the law hath not fixed any certain or determinate time for suing out writs of error to reverse the judgments of this court in the Exchequer-chamber; but such writs are always allowed by the secondary, as well out of term as within; and a motion was never yet made in this court to allow a writ of error.

Excheq.

The Chief Justice and two other Judges were of opinion that it would be hard, that the execution of a judgment in this court should be delayed by a writ of error allowed by a secondary; for if that should be so, then any man may avoid the execution for a whole vacation, at the expence of no more than one shilling.

Curia.

There is certainly some variance between a writ of error of a judgment *coram vobis residen.* and other writs of error, for the one is directed to the justices of this court, and therefore should be allowed by the court; but the other is directed to the Chief Justice only.

But Justice Eyre was of another opinion; he cited the case of *Louns* and *Carter* in the Chief Justice *Holt's* time, where a writ of error was adjudged a *superfedeas* before it was allowed.

It is true, there is a difference between this case and other writs of error; but the reason is plain, for where writs of error are brought in the Exchequer-chamber, or in the House of Peers, to reverse the judgments of this court, they are always directed to the Chief Justice alone, because he is to certify the record; but where a writ of error *coram vobis residen.* is brought, there is no record certified.

* P. 148.

Besides, there never yet was a motion in a court of law to allow a writ of error, because it is a writ of right, and due to the subject *ex debito justitiae*.

But

Term. S. Trin. 9 Georgii, 1723.

But admitting this writ is no *supersedeas* before the allowance, yet it is a good *supersedeas* after it is allowed, as this was by the secondary, and before notice; and so it was adjudged in the case of * *Smith versus Cave*, in which case an execution executed was set aside; but the want of notice excused the contempt.

* 3 Lev. 312.
See Dyer 244.
Poph. 132.
Vent. 207.
Mod. 112.

† This case
was argued
first this term;
and afterwards argued again and determined in Hil. 10 Geo. 2 Ld. Raym. 1334.

The King *versus* The University of Cambridge. †

Mandamus to
restore Dr.
Bentley to the
degrees he
had taken in
the Univer-
sity.

2 Ld. Raym.
1334.
Stra. 557.
Fortesc. Rep.
202.
See Andr.
177.
3 Bac. Abr.
532.

MANDAMUS to the vice-chancellor, masters and scholars of *Cambridge*, to restore Dr. *Bentley* to the degrees to which he had been admitted by the University, and had been surreptitiously degraded (as was suggested), or that they should shew cause why he should not be restored.

The counsel for the University desired time to shew cause why a *mandamus* should not go, for that there were several old books and charters which were necessary to be inspected before they could shew cause; and thereupon the time was enlarged for that purpose.

And upon another day it was argued for the University, that by virtue of a charter given to them by *Queen Elizabeth*, they had a court of judicature to try and determine all matters arising within their jurisdiction, in which court a plaint was levied by Dr. *Middleton* against Dr. *Bentley*, and thereupon a summons was sent by the beadle to the Doctor, which he received, and spoke contemptuous words of the court, for which he was degraded, and from which no appeal would lie, no more than a writ of error would lie for imposing a fine by a temporal court, for a contempt, because every court of record is entrusted with the final judgment of what shall be a contempt to their authority; therefore if an appeal or a writ of error would lie in such case, it would put the trial of what is a contempt to the discretion and judgment of a superior court, and so strip an inferior court of that power which they have by law to judge what is a contempt to them; whereas contempts of the authority of courts are undoubtedly to be judged by the same courts to whom the contempt is offered; which is the reason that a writ of error will not lie on a sentence for a contempt to this court; but then it must be plainly proved.

* P. 149. tempt * to the discretion and judgment of a superior court, and so strip an inferior court of that power which they have by law to judge what is a contempt to them; whereas contempts of the authority of courts are undoubtedly to be judged by the same courts to whom the contempt is offered; which is the reason that a writ of error will not lie on a sentence for a contempt to this court; but then it must be plainly proved.

Now the same thing is done by a *mandamus* after an indirect manner, as would have been done by an appeal or writ of error, if that would lie; but as an *appeal* will not lie for a contempt, so neither will a *mandamus*; for admitting this degradation had been *ad libitum*, yet a temporal court could not grant a *mandamus*; it is like the case of a recorder of a corporation who was removable at will, and being displaced moved for a *mandamus*, but it was denied.

Besides

Term. S. Trin. 9 Georgii, 1723.

Besides the constant course and custom of this University, warrants a discretionary power amongst them to confer degrees on some; and to degrade others for any contempt; and in this case they have done all they could to bring *Dr. Bentley* to an easy agreement; for after the first summons they sent another in writing by their beadle, but the Doctor's doors were then shut, and he would not be seen; then they adjourned from day to day, on purpose to give him leave to appear, before they would suspend him; but when he contemptuously declined, they first suspended and afterwards degraded him.

Now, as a *mandamus* was never yet granted to admit a man to a degree in the University, after he had performed all his exercises, so there ought to be none to restore one after a degradation, because degrees are arbitrarily given by the Universities, and so are degradations arbitrarily made; for if they should by any means rashly admit an unlearned man to a degree, they may upon better information degrade him, without taking a traverse to the return of a *mandamus*, which must be tried by a jury of lay freeholders.

Besides these degrees are but titles of honour and precedency, and give no * temporal right, and for that reason a *mandamus* ought not * Lev. 119. to go; for if a *knight* should be degraded in a *court of honour*, no *mandamus* would lie to restore him, which is a case in point; therefore if it should lie in this case, it would introduce a new method to evade * the privileges given by this charter, which was afterwards confirmed by parliament; and as it hath been formerly adjudged in *Castle* and *Litchfield's* case, that a *certiorari* or writ of error will not lie to correct a judgment given for a contempt; so no *mandamus* ought to go, which is in effect the same. * P. 150.

If it should be objected, that his degree doth qualify him for some temporal employment, of which he would be incapable without it; now admitting that to be true, yet such employments are only consequential, and not directly incident to his degree, and therefore ought not to be regarded.

And if another objection should be made, (*viz.*) That the Doctor would have appeared by a proctor, but was not allowed so to do; though this may be true, yet it is no objection of weight, because it might not be the course of their court to admit such appearances, and the Universities have a privilege to proceed according to their own laws, as an encouragement to learning; and if they have proceeded accordingly, this court will not interpose.

Now, take the case as it stands upon *Dr. Bentley's affidavit*, there will be no reason to grant a *mandamus*, for he makes oath, that he hath appealed from the sentence of the University court; which, if true, then there is another remedy for him to be restored, (*viz.*) By an appeal; and where there is another remedy, a *mandamus* is never granted.

Term. S. Trin. 9 Georgii, 1723.

Moreover the *Doctor* made oath, that the University had no power to degrade him; if so, then he is not degraded for want of a sufficient power so to do, and consequently a *mandamus* ought not to go, for it is impossible that a man should be restored to his degree who was never degraded.

Econtra.

But on the other side it was said, that the merits of this cause ought not to be argued upon a motion, but upon the return of the *mandamus*, and for that reason it ought to be granted.

Curia.

All care shall be taken that justice shall be duly administered in the Universities; but if they assume an arbitrary power exempt from the jurisdiction of any other court of judicature, then they may do what they please without control; and where people are under such a government, they are in a very bad condition.

But this court hath a greater regard to the learning of the Universities, than to admit the arbitrary sentence of a Vice-chancellor to be final.

* P. 151. * As to what has been said, that the degrees in the Universities are only *honorary*; this is a mistake, for they are blended with a temporal right so far as to deserve a *mandamus* to restore a man degraded; it is true, this might have been a proper objection before the statutes of H. 8. and Car. 2. were made, which render a man incapable of a benefice, if he had not taken his degrees in some University; for before those statutes, such degrees were only titles of precedency, and the allowing them, or a degradation, was no temporal advantage or loss; therefore in such case the temporal courts had no reason to interpose; and this may be the reason why the Universities degraded *ad libitum*, and of their constant course so to do.

But this is no objection since the making those statutes, neither shall it be said, that where a *corporation* hath admitted a man willingly to his freedom, that they shall have power to disfranchise him, because they do not like him; neither can the Universities give degrees to whom they please, and take them away *ad libitum*; and tho' their counsel have objected against this *mandamus*, for that they have an exempt and absolute jurisdiction amongst themselves; this seems to be a good reason why it should be granted, though it might have been otherwise if they had shewed that they had a visitor to whom an appeal would lie; for probably that might have excluded the superintendency of this court; but to deny a degree to him who had performed all his exercises to qualify him for a degree, would be a great discouragement to learning; and in such case this court would grant a *mandamus* to admit him, especially since it is accompanied with a temporal interest.

Now admitting it should be enacted by some statute, that a man should be incapable of such an office, if he was not a *knight*, should not a *knight* degraded have a *mandamus*, certainly he should, and so had Dr. Bentley in this case.

After

Term. S. Trin. 9 Georgii, 1723.

After the *mandamus* was granted, the University made this return, The return of the mandamus.
* ff. " That the University hath been an antient University *tempus*
" *donc*, &c. and also a corporation by the name of Chancellor, * P. 152.
" Masters and Scholars; that they have had the care and education
" of the youth and scholars there; that they have had and used
" the right of conferring degrees on any persons whom they pleased,
" and the same persons *ab eisdem gradibus (propter contumaciam*
" *vel aliquam aliam justam vel rationabilem causam) suspendere vel*
" *deprivare*; that a court was granted by Queen Elizabeth to the
" University to be held before the Vice-chancellor for the time
" being, or his deputy, and to have cognisance of all pleas, &c.
" except matters of freehold and felony; that the privileges of the
" University have been confirmed by act of parliament; that Doctor 13 El. c. 21.
" Coniers Middleton levied a plaint in the said court against Doctor
" Bentley in a plea of debt for 4 l. 6 s. (they both residing within
" the same University) *secundum consuetudinem curiæ*, and prayed
" process; *super quo*, at his petition, the court awarded a process
" *ad compellend. prædict. Ricardum Bentley ad apparend. coram* the
" Vice-chancellor or his deputy *ad prox. cur. quod quidem decre-*
" *tum*, the 23d of September 1718. *fuit deliberat. Edwardo Clarke*,
" beadle of the court; that the said Edward Clarke *accessit ad dic-*
" *tum R. Bentley & ostendit dictum decretum; et superinde* the said
" 23d of Sept. the said R. Bentley having discourse with the said
" Edward Clarke concerning Doctor Gooch being then Vice-chan-
" cellor, said that the decree was unlawful and unstatutable, &
" *quod noluit illud obedire*, that Doctor Gooch *non fuit ipse iudex*
" & *stultè egit*, & *alia verba contumeliosa propalavit*, & *dictum de-*
" *cretum de manibus Ed. Clarke abstulit*; that at the next court
" Doctor Middleton appeared and declared in debt for 4 l. 6 s. *se-*
" *secund. consuetud.* at which court the said Ed. Clarke *quasdam de-*
" *positiones exhibuit* to the register of the said contempt and disobe-
" dience of the said R. Bentley; that thereupon the Vice-chancellor,
" with consent of seven Doctors of the University, who were heads
" of colleges, declared that the said R. Bentley *pro contemptu illo*
" *suspensus fuit ab omni gradu suscepto titulo & jure*, and he was
" accordingly suspended.
" The return further shews that there is a custom within the
" University to assemble the masters of the colleges in the Univer-
" sity, which assembly is stiled a congregation, and have power
" (*super contumaciam vel aliam justam & rationabilem causam*) to
" deprive any person of their degrees, & *super purgationem resti-*
" *tuere*: that accordingly a congregation was assembled 17 October,
" when Doctor Gooch *narravit contemptum prædict. pro quo suspens.*
" & *deprivat. fuit*, & *petit quod dejiciatur & excludatur*, &c. Et
" *superinde visis præmissis & lectis depositionibus prædict.* the said
" congregation confirmed the decree of suspension, and further or-
" dered, that the said R. Bentley *de omni gradu suscepto & titulo &*
" *jure penitus dejiciatur & excludatur. Et pro his causis, &c.*

Term. S. Trin. 9 Georgii, 1723.

The argument
against the re-
turn.

It was objected against this return in general, that admitting the Vice-chancellor, Masters and Scholars had a power of giving degrees, and of suspending and degrading for reasonable Causes; yet that power must be under the inspection of this court, unless they can shew some good cause to exclude it.

Now by this return they do not pretend, that any appeal did lie to a proper visitor, but have absolutely excluded all visitatorial inspection, so that by their own shewing they are subject to the jurisdiction of this court, as all other corporations are.

• 21 H. 8.
cap. 13.

Besides, every man who is admitted to a degree in the University hath a freehold for life, of which several statutes take notice; as for instance, the statute * 21 H. 8. enacts, that the several persons therein named, and who are admitted to degrees in either of our Universities, and not by grace only, may purchase a dispensation to keep two benefices with cure, &c. which benefices are for life.

17 Car. 2.
cap. 3.

So by the statute 17 Car. 2. it is enacted, That the incumbents of churches united must be graduates in one of our Universities, which union is likewise for life, and no persons are capable of such benefices but graduates.

* P. 153.

Therefore this court will take notice of such degrees as entitling the graduates to some temporal right; and if so, * then the question will be on this return, whether the sentence given in the Vice-chancellor's court is legal, or not.

It is admitted, that the Doctor was guilty of a contempt, for which they might have punished him, if they had proceeded in a right method; but it is certainly wrong to take away a man's freehold by any other means than *per legem terræ*.

Then as to the return itself, it appears that there were four causes to suspend the Doctor.

(1.) In saying that the Vice-chancellor acted rashly, for *haste agit* implies rashly as well as foolishly, and in the return shall be taken in *mitiori sensu*.

(2.) In saying that the Vice-chancellor was not his judge.

(3.) By taking the process from the beadle.

(4.) In saying that the process was illegal.

But they do not return any custom of suspending or degrading; though if they had, it had been void, if it was unreasonable, as it was held in the case of the city of London, that an unreasonable custom, though confirmed by act parliament, is void.

Neither do they set forth what punishment is to be inflicted for a contempt, in case the offender had not been a graduate.

Then they say, that the depositions for this contumacy were exhibited by the beadle, &c. now by reason of this hasty judgment, those depositions ought to be very plain; but it doth not appear that they were taken before a proper magistrate who had power to tender an oath, but only that they were taken *de contemptu prædicto*.

Now

Term. S. Trin. 9 Georgii, 1723.

Now the word deposition doth not *ex vi termini* imply, that it was taken on oath, for it is a * relative word, and denotes no charge; and it doth not appear but that it might be taken to clear him of a contempt, and convictions are daily quashed for such faults where they fix no crime on the convicted; now if they had returned before whom the depositions were taken, it might have appeared to be before one who had no power to take them.

* Yel. 72,
111, 122.
Latch 39:
3 Inst. 167.

Another part of the return was, that the power of conferring degrees is in the *Vice-chancellor, Masters and Scholars*, and so is the power of *suspending and degrading*; therefore of their own shewing the *Vice-chancellor's court* hath no such power; it is like a *corporation* which hath power to remove a freeman, but if he is removed by a *court of a corporation*, it is illegal.

* By the law of *England*, a man cannot be twice punished for the same offence, but here the Doctor was twice punished for this contempt; first he was *suspended* by the *Vice-chancellor's court*, and afterwards upon a *grace* proposed to a *congregation of Doctors* and heads of houses by the said *Vice-chancellor*, he by the advice and consent of seven other *Doctors* of the *University* was *degraded*; which is a double punishment; for how can that *congregation* take notice of the *suspension*, it not coming before them, either by writ of error or appeal; so that it was an extrajudicial cause, and in a very extraordinary manner, and cannot be a confirmation of the first sentence; but a second punishment independent of the first, which was the suspension, and that also for the same crime, so that it is wrong and unjust.

* P. 154.

Besides, of their own shewing *that court and that congregation* had only a jurisdiction over those who *reside in the University*; and therefore the *Doctor* could not be suspended, unless he *resided* there, which for ought appears must be taken by intendment, for it is nowhere expressly alledged, *that he did reside there*; neither do they shew to whom the contempt was, unless it shall be intended to *that court who sent the summons*.

It is likewise returned, that a process issued to summon *Dr. Bentley* to appear at the next court, but they do not shew the nature of this process, whether it was by *arrest, distress, or summons*, which ought to have been set forth; neither do they shew *where or when* the next court was to be kept, or for what cause he should appear there; neither is it alledged, that he had notice of either, or that he was in contempt; for if these things had been set forth, the *Doctor* might have an *opportunity to defend his freehold*.

Vent. 182.

How can a man be said to be contumacious to a court when he did not know * *when, and where they assembled as a court*; now as to that matter, it is a constant rule in all cases where a *mandamus* is granted, that the party should have notice of his charge; but it doth not appear by this return, that the *Doctor* was summoned to answer for a contempt, so that he was sentenced without being

* Cro. Jac.
506. pl. 18.

Term. S. Trin. 9 Georgii, 1723.

(a) 9 Edw. 4. heard, which is illegal, and against natural justice, as may appear by the cases in the (a) margin.

14. a. 39 H. 6. 32. 11 Co. 99. a. Sid. 14. pl. 7. 2 Sid. 97. Style 446, 452. Fortesc. Rep. 206, 325. Salk. 181. pl. 1. 2 Salk. 434, 435. Ld. Raym. 225. 2 Ld. Raym. 1343, 1405, 1407. 4 Mod. 33, 37. 6 Mod. 41. Ante 3, 101. Post 377. 12 Mod. 27. Stra. 567, 630, 678. Sef. Caf. 172. pl. 155. 219. pl. 179. 267. pl. 210. 295. pl. 232. 353. pl. 281. Fol. 416. Caf. of Ser. and Rem. 373. 2 Barnard. K. B. 241, 264, 282.

But if all the causes returned were true, yet none of them are sufficient either to *suspend or degrade the Doctor*, because a suspension by their own shewing, must be for some reasonable cause; now they do not *set forth that a contempt* to this court was a reasonable cause to suspend the *Doctor*; * it is true, they have alledged a power time out of mind to *suspend and degrade*; now this must be by custom, for they do not pretend to any jurisdiction by the civil law; now all *customs* in *England* are *prima facie* to be intended at common law, unless specially set forth to be otherwise, and they must have a reasonable commencement, otherwise they are not good; but this *custom* is unreasonable and inconsistent with the common law, it being of a power to *suspend and degrade at pleasure*; and it is not sufficient to shew that they had a jurisdiction of the cause, for that would destroy all manner of right; because if it should be allowed, then every corporation might shew that they had a power to remove, or disfranchise any member thereof, and give no account of the cause of such removal or disfranchisement; but the constant practice in such cases is otherwise, therefore they ought to have set forth in this return, that the *contempt* was a reasonable cause of suspension.

Mandamus,
where it will
lie.

Upon the whole matter, wherever a man loses any thing depending on a freehold, a *mandamus* will lie, if he hath no other remedy; it was granted to a *presbyterian parson*, and directed to a justice of peace, to admit him to take the oaths and subscribe the test, that he might be entitled by law to preach in his congregation, and therefore a *peremptory mandamus* was prayed.

Econtra.

It was argued for the University, and to maintain the Return, that there was nothing in this case but what was usual in cases of this nature, for as in the courts of common law, if the defendant refuse to appear upon process of those courts issued out against him, then he is to be outlawed; and if it is out of the spiritual courts, then he is excommunicated; so in these courts of Universities, a *suspension or degradation* is the only method to enforce an obedience to their authority; and though they proceed in a different manner from the course of the common law, yet, if it is warranted by any other law, or by the allowed usage amongst them, it is good.

Now this method of proceeding is allowed in all the Universities in *Europe*, and as they have a power to suspend, so likewise they have a power to restore the person suspended, upon his submission; and by the charter granted to this University by *Queen Elizabeth*, they

they have a particular power to determine all causes arising within their jurisdiction.

It hath been alledged on the other side before this *mandamus* was granted, that degrees in the Universities are only titles of honour, and given as the rewards of learning * and merit; now, allowing * P. 136. this to be true, it is certainly a very strange inference to say, that the persons to whom such degrees are given cannot therefore lose them for a contempt, or any other demerit.

Besides, these degrees are given by the University, under a tacit condition that the graduates shall conform themselves to the rules and usages there, and for that reason it is no novelty to proceed against them for disobedience to those rules, but warranted by the constant practice in all Universities here and abroad.

Now, to answer the objections made against this return; first, it was said, that it doth not appear that there was any reasonable cause for this *suspension*, nor how the process issued.

Answ. In answer to this objection it plainly appears that there was a plaint levied in the court against *Dr. Bentley*, according to the custom of the University, and that according to such custom process issued against him, which must be a *citation*, because that is the first process in all ecclesiastical courts, or in cases where the proceedings are according to the course of the civil law, which is the law generally used in all Universities.

It is true, there were cases cited on the other side, which prove, that the process must contain the *day when, and the place where the court is to be held, and likewise the cause of action; all which were omitted in this process*; the reason is, because this was a process according to the civil law, wherein such certainty is not required, as if it had been a process at common law, by which the time and place of holding the court must be ascertained; but where the time is uncertain, as it is in all inferior courts, (*viz.*) when they are to be held, there is no occasion of mentioning the day in the *process*, because the person summoned must take notice himself when the court is to be kept.

Dyer 162.
1 Roll. 484.
2 Cro. 314.
572.
2 Bull. 36.
Cro. Car. 254.
Shower 85,
95.

As to that objection, that it doth not appear that the depositions exhibited by the beadle to prove the contempt, were taken by a proper magistrate, *upon oath*, who had power to administer such oath.

Answ. This might be a proper objection, if the proceedings had been likewise at common law; but an oath in such cases is not required by the civil law, because by that law it is sufficient to say, that it was done *ex relatione* " of the officer to whom the contempt " was offered; *depositio* imports an oath. If not, why should an " oath be necessary. The court is the proper judge what sort of " evidence to proceed on; if their proceedings are different from " proceedings in this court, that will be no reason for a peremptory " *mandamus*; by the ecclesiastical law, their courts may proceed in " suits

Term. S. Trin. 9 Georgii, 1723.

“ suits by a wife without her husband, and this court will not
“ grant a prohibition. So the admiralty courts in *England* may
“ execute a sentence in a foreign admiralty given in a cause arising
“ on land without being prohibited by the common law ;” and it is
what frequently happens, even in courts of common law, to order a
* P. 157. man into custody for speaking * contemptuous words of such
courts, upon an *affidavit* made, that the party was summoned, &c.

Obj. As to that objection, (*viz.*) *That the cause of action* is not
set forth in the return for which the Doctor was to appear.

Answ. One would think that he who made this objection had not
read the return, because it plainly sets forth, that a plaint was levied
by *Dr. Middleton* against the said *Dr. Bentley*, and process issued
against him to appear, &c. and that *Dr. Middleton* declared for
his debt, &c.

Obj. and Answ. And as to that objection, that there was not *any*
contempt set forth, the contrary is certainly true ; for it is returned,
that the Doctor took the process from the *beadle*, which is a con-
tempt ; and this appears by a statute of the other University of
Oxford, which is, that if any person shall take the Vice-chancellor’s
writ from the beadle, he shall be degraded, if a *graduate* ; and if
not a graduate, then he shall be otherwise punished ; by which it
appears, that University took it to be a contempt, to have their
process taken from a beadle.

It is true, it doth not appear by this return in express words, that
it was taken from him by violence, or that it was not restored ; but
the words *de manibus summonitoris abstulit*, imply a taking by *vio-*
lence and force.

Besides, it appears by this return that the Doctor said he would
not obey the summons, and that the Vice-chancellor acted foolishly,
and that he was not his judge, which being spoken to the beadle, is
certainly a contempt ; for if the Doctor had any thing to shew why
the Vice-chancellor had no jurisdiction, he ought (as the law di-
rects) to have appeared and shewed the cause, and not to tell it to
the beadle, to bring their court and their proceedings into the con-
tempt of the vulgar.

Obj. It hath been farther objected, that if the *day and place* of
holding this court had been set forth, and notice likewise given to
the Doctor to appear and answer a contempt, he might then have
an opportunity of appearing and clearing himself from that charge ;
but those things being omitted in the return, he could have no such
opportunity.

Answ. In the return it is plain that he was summoned to appear
at the next court, and that for not appearing he was suspended,
which is a full answer to that objection ; but the suspension had
been good, though the Doctor had never been summoned.

* P. 158. * It is true, it is against natural justice to punish a man without
hearing him ; but it is a mistaken method of arguing to apply
general

general rules to particular cases; for it is sufficient if the *Doctor* had an opportunity to be heard, and that is not denied; but it is plain that he would not be heard, for he spoke contemptuous words of that court, where he should be heard; and therefore since he despised their authority, there was no occasion for a second summons to answer the contempt; for the rule is *contra veram contumaciam non amplius est advocandus*.

Now where the civil law is the rule and the guide of the court, and they proceed according to that law; the courts in *Westminster-hall* always give credit to such proceedings, otherwise it might be of very bad consequence to have an inferior court proceed by one law, and to have the sentence of such court reversed by a superior court where the proceedings are by another method, and by another law.

The sentence given against the *Doctor* is not so very severe as it hath been represented, because upon his submission or clearing himself of the contempt, he might be restored to his degrees at any time; and this degradation which is only a means to enforce his obedience would be quashed, so that it is his own fault and obstinacy if he is not restored.

It hath been said on the other side, that a disfranchisement of a freeman for a contempt to the mayor's court was never yet seen, which is very true; but these cases are far different from degradations, because where a member of a *corporation* is disfranchised, he is secluded from all privileges of that *corporation*, and the rest of the corporate body are deprived of their interest in him, and of his voting in any corporate act; but it is otherwise in the case of a *degradation*, because the person degraded is still a member of the University (for so is the *Doctor* in this case) who is still head of a college; it is true, this *degradation* is a personal reflection on him, and he is thereby deprived of some benefit arising from his degrees in this University, but he is still a member thereof.

All that was done as to his degradation was *secundum leges & consuetudines Universitatis*, who have a power finally to determine in such cases; yet that doth not exclude other powers to inspect their actions; but if they proceed according to their known laws and customs, though a little different * from the *common law*, this court * P. 159. will give credit to their proceedings, and not interpose.

Now in this case they proceeded according to the laws and customs of the University; for the *Vice-chancellor's* court hath cognisance of all personal actions arising there, and where any of the members thereof are concerned, (excepting felonies) and this is an independent jurisdiction exclusive of all others time out of mind, and confirmed by act of parliament, any law, custom, statute or *constitution* notwithstanding; and this is purely to give them leave to proceed according to the civil law.

It is true, my Lord Chief Justice Hale, in his history of the *common law*, tells us, that the King cannot give power by his *charter* to set up any jurisdiction to proceed by any other means than the *common law*; which shews, that though he cannot do it by *charter*, yet it may be done by act of parliament, as it was done in this case on purpose that they might proceed by the civil law; therefore this court will not interpose to examine their proceedings, whether they are right or not, because that court proceeds by a different law, (*viz.*) by the *civil law*, and they have returned, that the *Doctor* was suspended according to the *customs of the University*, so that this suspension must be according to *civil law*.

Obj. As to the objection, that no *particular custom* is returned, for the *Vice-chancellor's court* either to suspend or degrade, and that those were punishments not adequate to the crime, which was only a *contempt*.

Ans. The answer is, that it plainly appears to be otherwise by the *civil law*, which is to be the measure of the punishment in this case.

Obj. It hath been likewise objected, that those degrees confer a temporal right on those to whom they are granted.

Ans. It is true, those degrees are granted by virtue of a power given by the *crown*, as all other honours and precedencies are; and the granting them is but the *disposition* or order of the precedency included in that liberty given by the *crown* in founding a college, like a *corporation* which likewise is founded by virtue of the King's grant.

Now all collateral qualities tacked by the parliament to those degrees, do not alter the *power* of the *Universities* to dispose them as matters of precedency, nor alter the nature of those very degrees; as if an act of parliament should be made, that no person should be capable of such benefices, but those who were bred at one of the * P. 160. *schools at Eaton* or * *Westminster*, would such a statute make any alteration in the discipline of those schools, but that still they might give precedency to one scholar before another, without the interposition of this court? and the *University* itself is but one great *school*, (*viz.*) *schola illustris*.

The case of *holy orders* is still of a higher nature, and in consequence thereof hath a greater temporal right; yet that right may be taken away by a sentence in another court, and not subject to the control of this or of any other temporal court; as for instance, the * *Bishop of St. David's* was degraded in the spiritual court for *simony*, and in consequence of such degradation lost his *barony*, but this court would not interpose.

* Salk. 106,
134, 294.

So likewise where any person is *excommunicated*, or where a *Chancellor* grants a sequestration to enforce an obedience to the ecclesiastical law, no *prohibitions* or *certionaries* will lie.

Term. S. Trin. 9 Georgii, 1723.

So a feme covert may sue in the spiritual court without her husband, and this being allowed by their law, this court will not interpose; so justices of peace have power by several statutes *finaliter determinare*, and that in a summary way and method different from the common law; and this court will give credit to their proceedings, if they act accordingly.

Now this suspension is no more than an *amotion* by virtue of a clause in their charter; so that if the cause was within their jurisdiction, a *mandamus* cannot be granted for any irregularity, for that is altogether out of the case, because this court is not to enquire thereof, where the cause is within the jurisdiction of the *civil law*; and therefore *anno 12 Will.* this court would not interpose in *Dr. Groenvelt's* case, who was fined and imprisoned by the college of physicians, they having power by a statute so to do. Rol. Abr. 530.
553.
Sid. 72.
T. Raym. 3.
Lev. 267.
4 Mod. 160.
Ventr. 32.

If a man is excommunicated who was never cited, this court will not grant a *prohibition*.

“ The proper remedy is by appeal, it being an error in their
“ proceeding, for an appeal lies *de nullitatibus*; so if an act of par-
“ liament giving justices of peace power to convict enacts, that no
“ *certiorari* shall be brought, the person convicted hath no remedy
“ but by action upon the case, if the conviction is malicious. This
“ charter which created the Vice-chancellor having exclusive clauses,
“ the court ought not to question the regularity of their proceed-
“ ings: but an appeal may be brought in the senate.”

Obj. It hath been objected, that this suspension is no more than an *amotion* by a *corporation* in common cases, so it could not be done by the *Vice-chancellor's court*, no more than a man can be removed by a *court of a corporation*.

But this objection is wrong, for where the body of the *University* are judges, as in this case, there the *Vice-chancellor* is only their *locum tenens* in order to execute justice; * and the *University* is ac- * P. 161.
tive in him who hath a delegated power to hold *courts* before the whole body, and a part is implied to be acted by the whole *corporate* body by their law, as the *graviores causæ*, such as granting degrees or depriving; and it is set forth, that their *court* hath power to suspend or deprive, and to restore upon submission; but when the *Doctor* hath contemned that court, they may certainly suspend him without a second summons, especially since the contempt was to that *court*, by which he was suspended.

It was objected, that he hath no remedy but by a *mandamus*, for tho' he might be willing to submit, yet the *Vice-chancellor* might never call a court, and it is wholly in his power not to call one.

Now as to that matter there is a constant call of two such *courts* every year; besides, it is in his *power* upon extraordinary cases to call a *convocation* at any other time; and this appears in the very return, but if it had not been set forth, it is implied by the course of the *civil law*; for by that law all punishments for contumacy are
from

Term. S. Trin. 9 Georgii, 1723.

from the nature of them temporary, though imposed in general terms; so that this *University* hath proceeded as usual, and as all other *Universities* in *Christendom*; and it is necessary in such cases to use some extraordinary jurisdiction, where young persons meet together from all places in the most unruly part of their lives; otherwise it would be of very ill consequence, if the *governors* could not enforce an obedience without being subject to the *control of this court*.

Upon the whole matter, the *Doctor* knows that he is degraded, and for what cause, and he ought to have made his submission before he moved for a *mandamus*, and if that had been done, he might have no occasion to apply himself to this court.

Curia. This is a case of great consequence, both as to the *property, honour and learning* of this *University*, and concerns every graduate there, though at present it is the case only of one learned man, and the head of a college.

The question is, Whether the *University* can *suspend and degrade*, and by what rules they may proceed in either, or both of these cases; and as to this matter, it is allowed they may *suspend or degrade* for a reasonable cause; but then the cause must be specially set forth, that the court may judge whether it is reasonable, and according to law. And upon this ground it is, that a return of a suspension for contumacy generally will not be good, for the particulars of the contumacy ought to be specified. 5 Rep. 57. by Pratt L. C. J.

** P. 162. * It is agreeable to law, that a man shall not be deprived of his property without being heard, unless it is by his own default; but it is hard, that it should be in the power of one man to suspend or degrade another, without any *appeal*; for if he should err (as all men are subject to errors) then the person suspended or degraded hath no remedy.

It is allowed, that this *University* hath a jurisdiction in several cases, and this court will support them in the exercise of such jurisdiction, if they do not exceed their proper bounds and limits.

Now as to the return, there are several causes set forth both for the *suspension and degradation*, (*viz.*) In saying, *that he would not obey the summons, that it was illegal, that the Vice-chancellor stultegit, and that he was not his judge*, and all this spoken to a beadle who served the process of their court, and in a very indecent manner, in diminution of the authority thereof, and to make it ridiculous, which is consequently a contempt thereof; and if the like had been done to an officer of this court, it would have been accounted a great indignity, and the person should be punished; but then the matter must be brought before the court in a proper manner, and whether that was done in this case is now to be determined.

Now by this return it appears, that depositions for a contempt were exhibited by the beadle, but it doth not shew that those depositions were

Term. S. Trin. 9 Georgii, 1723.

were taken before a *proper judge*; and this being the foundation of the degradation, it doth not appear to this court that they had any power to degrade the *Doctor*.

But, admitting they had such a power, then the next thing to be considered on this return is, whether the cause returned is sufficient to justify this degradation; and if it was, then whether it was well returned.

“ *Fortescue* Just. The words are a contempt to the court, for
“ which he ought to have been committed if he had been present
“ in court; and if not, he ought to have been bound to his good
“ behaviour. I do not see how a deprivation for this cause is agree-
“ able to reason or justice: many customs of the University have
“ been adjudged void. It is a rule that all customs should be cer-
“ tain: now this custom to deprive *pro contumacia* is uncertain as
“ to the meaning of the word contumacy, whether it means con-
“ tumacy to the Congregation, Vice-chancellor, this Court, or the
“ University; whether to *Doctor Goach* as head of the college, or
“ as judge of the inferior court.

“ *Pratt* L. C. J. (as to this matter) The words are improper
“ and indecent: we should punish all persons who should speak so
“ disrespectfully of our process, and might bind them to their good
“ behaviour; but the authorities seem too strong to allow a power
“ to remove a person from his freehold for such words.

* They † return, that they had power to degrade for a contempt, * P. 163.
and this was given to them by a charter of *Queen Elizabeth*, and † This seems
for any other reasonable cause; now the cause returned was neither, to be meant
for it was not a contempt to the University, but to the Vice-chan- for what Eyre
cellor's court; it is like a contempt to a mayor, which can never be said on the
said to be a contempt to the whole corporation; therefore, though first argument;
they might degrade for a contempt to the University, it cannot be for when the
inferred from thence, that they may degrade for a contempt to a cause was de-
private court of that University. termined, he
was not upon
the bench,
being Lord
Ch. Bar. of
the Exche-
quer.

“ *Eyre* Just. said, that he was not satisfied that the University
“ can deprive for a contempt to the Vice-chancellor; for a con-
“ tempt to the Vice-chancellor is no contempt to the University:
“ they cannot deprive for all contumacies, nor have they returned
“ a power to deprive for a contumacy to the Vice-chancellor.

“ It must be intended, being general *propter contumaciam*, to
“ extend only to contempts to the University. Suppose in any
“ other corporation, a member should offer a contempt to an in-
“ ferior court, can the corporation deprive him? No: they can
“ only punish him as other inhabitants. A proper punishment for
“ a contempt is fine and imprisonment, but not loss of freehold;
“ an officer of this court ought not to lose his office for contemptu-
“ ous words to the court. A tenant to the lord of a manor or
“ district cannot lose his estate for non-attendance at any court.

Term. S. Trin. 9 Georgii, 1723.

“ By *Fortescue* Just. Though a degree in the University is only a civil honour, yet interest and property being the consequence of such degree, the court considers it as such with all its attendances. It is like the case of an alderman, which of itself is no profit, only by consequence; all degrees were originally given by the crown; and though the present right of conferring them is prescribed for by the University, yet that prescription must be presumed to be founded upon a right derived by authority from the crown; so that a person advanced to the degree of a doctor, &c. may be esteemed to be advanced by the King: there were no degrees among the *Grecians* or *Romans*, nor among the first Christians: they began about the 12th or 13th century, and have been since attended with great privileges and profits.

“ *Universitas* is the proper *Latin* word for corporation.

“ A learned man of this University told me that there were no degrees ever granted there till the University was a corporation; the seminaries for education of youth were antiently held in the cathedrals of the churches of the first Christians.

Besides, where any person is degraded for a contumacy, it ought to be by that court to whom the contempt was offered, but it is not pretended by this return, that the Vice-chancellor's court had any power to degrade.

Neither doth it appear that *Dr. Bentley* was ever summoned to answer this contempt; and it is against natural justice to deprive a man of his right before he is heard; therefore if there was a custom so to do, such custom would be absolutely void; and it is a thing of daily experience to grant prohibitions to spiritual courts, if they deny the defendants a copy of the libel, because such denial is against natural justice; and now to offer a common instance, (*viz.*) Suppose an officer of this court should shew any contempt thereof, could he be deprived of his office for such contempt? Certainly he could not.

It is true, they who have argued for the University, insisted, that the proceedings there are according to the *civil law*, and this they have done to justify the suspension, without being summoned to answer the contempt; but it doth not appear upon the return (upon which this court is to judge), that they proceed there by the civil law; and if so, then the court must intend that they proceed by the common law, which they have not done, for there is no manner of proof that the Doctor was summoned to appear to answer the contempt; and it can never be said, that a court which proceeds according to the common (a) law, shall suspend or degrade a person without being heard or summoned.

(a) By which law, *Fortescue* J. said, property was

infinitely more preserved, than by any law in the whole world.

It is said likewise, that this was not a proceeding by virtue of a charter alone, but by a charter confirmed by act of parliament; now

Term. S. Trin. 9 Georgii, 1723.

now admitting that to be true, it must be granted that convictions, even upon acts of parliament, are frequently quashed, for not summoning the persons convicted, though not required by the statute, because it is still against natural justice to convict without hearing.

“ By *Fortescue*. The want of a summons is an objection that can never be got over; had the custom been returned to deprive without summons, it had been void as against natural justice. “ If a justice of peace convicts any man without a summons, such conviction is void. I heard a learned civilian say, that God himself would not condemn *Adam* for his transgression till he had called him to know what he could say in his defence. *Gen. 3. 9.* “ Such proceeding is agreeable to justice.

*Stra. 567.
Sef. Caf. 219.
pl. 179.*

Lastly, admitting the University hath a jurisdiction, yet this court will inquire what they have done, and how they have used that jurisdiction, as it was done in * *Busbel's* case, where it was insisted, that the merits of the cause could not be inquired into upon the return of an *habeas corpus*, but it was over-ruled; and this court cannot affirm the proceedings in this case, without over-ruling *Busbel's* case, and several other authorities of the like nature.

* *Vaugh. Rep.*

For which reasons the court was unanimous in granting a *peremptory mandamus*; and in *Easter* term 10 *Geo.* the Doctor was restored to his degree.

Anonymus.

§. AT the sessions in the *Old Bailey* held there 9 *Aprilis* 9 *Georgii*, where some of the Judges of the Common Pleas were present, this case happened:

Two indicted for murder, and one acquitted.

§. Two men were beating another man in the street, and in the night-time, and a stranger passing by at the same time, said, He was ashamed to see two men beat one; thereupon one of those who was beating the other, ran to the stranger in a furious manner, and with a knife which he held in his right hand, gave him a deep wound, of which he died soon after; and now both the other were indicted as principals for the said murder, but the Judges were of opinion, that because it did not appear that one of them intended any injury to the person killed, he could not be guilty of his death, either as principal or accessory; it is * true, they were both doing an unlawful act, but the death of the party did not ensue upon that act; so he was acquitted and the other was found guilty; and this agrees with the case of + *The King and Thompson*.

* *P. 165.*

+ *Kel. Rep. 66, 67.*

At the same sessions another man was indicted on the statute 10 & 11 *Will. 3.* For stealing a shirt out of a shop, by which statute it is enacted, That any person, who by night or day shall, in any shop, warehouse, coach-house or stable, privately and feloniously steal any goods of the value of 5 s. or more, though such shop, &c. be not broke open,

10 & 11 *W. 3. cap. 23.*
The goods of another stolen out of a shop is not felony within that statute.

Term. S. Trin. 9 Georgii, 1723.

open, and though the owner, or any other person be, or be not in such shop, or that shall assist in committing such offence, being thereof convicted, shall not have the benefit of the clergy.

Now the case was thus, (*viz.*) A shirt which was the property of T. S. was left in the shop of W. R. to be sent to a seamstress, to mend it, and was stolen by the prisoner out of the said shop; the question was, Whether this was felony within the aforesaid statute, for which the offender could not have the benefit of clergy; and the Judges were of opinion, that it was not, for the statute was made as a remedy for the owners of shops to preserve their own goods, which might be left there by way of trade, but did not extend to goods casually lost there, and consequently the stealing such goods to the value of 5 s. was not felony without benefit of clergy; and the jury gave a verdict accordingly.

• See post
201, 291.

The King *versus* * Powell and others.

Information
in nature of a
quo warranto,
to shew cause
why he claim-
ed to be a ca-
pital burges.

A Rule was made on the defendant *Powell* and one *Jones* to shew cause why an information in nature of a *quo warranto* should not go against them to shew by what authority they claimed to be capital burgeses of the borough of *Brecknock*, &c. and the like rule on *Mr. Price*, to shew by what authority he claimed to be Recorder of that borough.

It was objected against the *capital burgeses*, that they were never duly chosen burgeses, and by consequence could not be capital burgeses.

Now, admitting that matter to be true, yet *Powell* being a *burghes de facto* ever since the year 1708, and *Jones* being * another such burges ever since the year 1712, it would be of fatal consequence to this borough, after so long an acquiescence, to make all the corporate acts done by them during all that time void.

And probably these men may be pursued a little farther, for the next step may be, whether they were ever admitted to their freedom, or whether they served seven years apprenticeship, which things may be very hard to prove upon a *quo warranto*.

As to the Recorder, he was elected 29 April 1722, but finding that election was not good, he was re-elected the 20th of May following, and before he was sworn into the office; so that there is no colour to extend this rule to him.

Econtra.

The long acquiescence, as suggested on the other side, can be no colour against this rule, which was made on the meer right; and it seems a little surprising that it should be offered against the rule, because length of time will never establish a right which was gained by usurpation.

Now

Term. S. Trin. 9 Georgii, 1723.

Now it is plain, that these men could never be *capital* if they never were *legal * burgessees*; it is true, in cases of not taking the sacrament, or the oaths of allegiance and supremacy, the court will intend that they were duly taken after a long acquiescence; but a *right* shall never be intended when the merits of it are controverted (as it is in this case), and no collateral part disputed.

* See ante
134. accord.

And the court being of that opinion, the rule was made absolute as to the *capital burgessees*, but discharged as to the Recorder, because he did not rely on his first, but on his last election.

Lilly versus Hodges.

THE case was: *ff.* The defendant and one *Griffith* covenanted for themselves and for each of them, and for their executors and administrators, and for each of their executors and administrators, with the said *Lilly* and *Cardonel*, to receive the rents due to the plaintiff *Lilly* and one *Cardonel* in *Ireland*, and likewise that they and each of them would pay a moiety thereof to each of them, the plaintiff and *Cardonel*.

Covenant by two, the action may be brought by one.
Stra. 553.

And now in an action of covenant brought against the defendant *Hodges* alone, by the plaintiff *Lilly*, for his moiety; the breach assigned was against both the covenantors, (*viz.*) That the defendant *Hodges* and *J. Griffith* received 7000 *l.* and that the defendant did not pay the moiety to the plaintiff, nor account to him for the rents, &c. * and upon the general issue pleaded, the plaintiff had a verdict.

* P. 167.

And now it was moved in arrest of judgment, that this action is not maintainable in this manner: it must be either an action against the defendant alone, charging him for his own act, or against both the defendant and *Griffith*, charging them on their joint act. This action is neither separate nor joint, but both confounded together; for the receipt of the money is laid to be by both.

Besides, the breach is assigned against both the covenantors; which is ill, because the action was brought against one, and by one of the covenantees, when it ought to have been brought by both upon the joint covenant.

Two persons may engage for the acts of both, as well as for the acts of one, and each may covenant for the other as well as for himself; † but that which is fatal in this action is, that the covenant was made to two, so they both ought to join, for otherwise one may recover, and so may the other, so that the covenantor would be doubly charged.

† This objection was first started by Eyre Just.

However, they were all of opinion, that the plaintiff should take his judgment, because the defendant had covenanted for the acts of his companion as well as for his own acts; and the breach and non-

Term. S. Trin. 9 Georgii, 1723.

performance of the covenant being laid jointly against both the *covenantors*, it is well enough.

The most material objection is, that both the *covenantees* ought to have *joined* in bringing this action, and that it should not be brought by one of them alone.

But it was adjudged, that the action is severed by the subsequent covenant, by which the defendant and the said *Griffith* covenanted each of them to pay a several moiety of the rents, for though the covenant was joint in the beginning of the deed, (*viz.*) They both covenanted to receive the rents; yet it was severed by the apparent intention of the parties by that subsequent clause of paying the moieties to each of the *covenantees*; and if that had been omitted in this deed, then the action must have been joint against both, but now it is severed, and well brought against one by one.

* P. 168.

* *Hinton versus Parker.*

Inventory may be falsified at the suit of a legatee, but not of a creditor.

IN a *prohibition*, the case was, (*viz.*) The widow of the testator exhibited an *inventory* of his goods in the *prerogative* court; and thereupon complaint was made by a legatee, that several goods of which the testator died possessed (naming them) were left out of this inventory, and an account was demanded to be given what became of those goods.

The defendant pleaded, that the said goods were disposed by the testator in his life-time, and by his leave; and on this plea the spiritual court gave costs, for that it was a confession of more assets than were in the inventory.

Whereupon the defendant now moved for a prohibition, on a suggestion, that the court proceeded to falsify an inventory which they had not power to do, because by exhibiting thereof, their jurisdiction was determined.

Curia.

By the civil law, if the creditors or

legatees, or any other person concerned, should discover any thing omitted, or should mistrust it, they will be admitted to prove the omissions and frauds which they shall alledge. Dom. 596. tit. 2. sect. 4. edit. 1737.

The

Term. S. Trin. 9 Georgii, 1723.

The Parish of St. Olave *versus* Parish of All-hallows
on the Wall.

THE case was, *ff.* One Underwood was bound apprentice to a farrier in the parish of St. Olave, and having served two years of his time in that parish, was by a verbal agreement between his master and one Tho. Dennis, sent to serve the said Dennis in the parish of All-hallows on the Wall in London, and there he served him five years; and afterwards coming back into the parish of St. Olave, and being likely to be chargeable, he was removed by an order of two justices to the parish of All-hallows, which order was confirmed upon an appeal to the next sessions; and both the orders being removed by *certiorari* into B. R. it was objected, that both of them should be quashed, because the apprentice was not turned over by writing to the master who dwelt in All-hallows; and if so, then he could not gain a settlement * there upon account of his apprenticeship, because it cannot be said, that he served in that parish as an apprentice.

An apprentice served two years in one parish, and was turned over to a master in another parish, and then served out his time, he shall be settled in the last parish.

* P. 169.

Str. 554.
Cas. of Set.
and Rem. 116.
pl. 153.

2 Sef. Cas. 176. pl. 138. Fol. 267. Fortesc. Rep. 308. Cas. of Set. and Rem. 16. pl. 23. Lord Raym. 683.

2 Stra. 1001.

This very point was determined in Michaelmas term 3 Georgii, between the parish of St. Leonard in Shoreditch and Trinity parish; and it was thus, (*viz.*) An apprentice bound to a master living in one parish, and serving some part of his apprenticeship there was, by a verbal agreement made between his master and another, to serve out his time with that other master in another parish; and this was adjudged a good settlement in that other parish where he last served; for it shall be still intended, that he served his first master upon that agreement, and that it was but a continuance of his apprenticeship; and so it was adjudged in the principal case.

Curia.
Stra. 10.
Sef. Cas. 112.
pl. 107.

St. Giles's Parish in Reading *versus* The Parishes of
Everfly, Blackwater.

THE case was, *ff.* One William Cbesterman, the father of the children now removed by the order of two justices of peace, was born in the parish of St. Giles's in Reading, and bound apprentice in the parish of Everfly, and having served two years of his apprenticeship there, his master broke, and then this apprentice came back to Reading, where he was born, and there married, and has these children, and in some time afterwards he died.

Children must be settled where their parents were settled.

2 Sef. Cas. 116. pl. 112.
2 Ld. Raym. 1332.

320. Fol. 396. Cas. of Set. and Rem. 112. pl. 149. Stra. 580. See Andr. 350.

There

Term. S. Trin. 9 Georgii, 1723.

There were endeavours in his life-time to remove him to *Everfly*, where he had served two years of his apprenticeship, but he was not actually removed.

But after his death his widow and children were by order of two justices sent to the said parish of *Everfly*; and upon an appeal to the next sessions, that order was *quashed*, and an order made, that they shall be sent back to the parish of *St. Giles's*, because the wife before her marriage had a lawful settlement there.

T. Raym.

476.

2 Salk. 528.

pl. 12.

6 Mod. 87.

Fortesc. Rep. 322.

Ch. J. 578. pl. 15.

Set. and Rem. 241. pl. 281. 244. pl. 282. 3 Salk. 259. pl. 14. Cas. Temp. Holt

Curia.

* P. 170.

The Chief Justice was of opinion, that during the *life-time of the father*, the settlement of the children must be where he was settled, and thither they may be sent; * but if he had no legal settlement, then the children must be sent to the place where they were born.

Now the father of these children being dead, and some attempt being made to remove him in his life-time, though he was not actually removed; yet that shews his settlement was contended, and the children being born under such a contested settlement must be sent to the place of their birth, though it might have been other-

(a) Lord Raymond, Lord

wife, if there had been no contest. (a)
Fortescue Aland, Foley and Andrews, all report that Pratt Ch. Just. entirely agreed with the other Judges, who were all upon the bench, and unanimous. 2 Ld. Raym. 1332. Fortesc. Rep. 320. Fol. 398. Andr. 350. But Sir John Strange says that three Judges were of opinion against Raymond J. Stra. 580. However Lord Raymond hath himself informed us that he agreed with his brothers. 2 Ld. Raym. 1332.

But there were two Judges of a contrary opinion, (*viz.*) That after the death of the husband, who was the father of these children, both *their mother and the children* ought to be sent to the place where he had a lawful settlement; and that his death (in this case) made no alteration as to the settlement; for where-ever the husband and father had a legal settlement, the widow and children gain a settlement there.

Bastards settled where they are born.

Servant may be settled where his master had no settlement.

Nor doth it alter the case, though the wife had another settlement before her marriage, because by her marriage that settlement was lost, and *birth* gains a settlement of the children in no case but where the settlement of their father or mother is not known, (excepting only in cases of bastardy,) and there it gains a settlement only *prima facie* till the legal settlement is known, and no longer, and the reason is, because the children should not be vagrants.

It is true, a servant may be settled in a place where his master had no settlement; as if he was a visitor or scholar; for that service which is the foundation of his settlement is entirely independent of his

Term. S. Trin. 9 Georgii, 1723.

his master; but that is not like the present case, (*viz.*) The settlement of a child by virtue of the settlement of his parents; because by the law of nature they are to provide for their children, so that their settlement must necessarily depend upon that of their parents.

Afterwards by the unanimous opinion of the court, the order of sessions was quashed, and the order of the justices confirmed.

* Grey *versus* Mendez.

* P. 171.

Indebitatus assumpsit brought against the defendant by an assignee of commissioners of bankrupts.

The defendant pleaded the statute of limitations, (*viz.*) *Non assumpsit infra sex annos & sic nil debet.*

The plaintiff replied, That the assignment by the commissioners, &c. was made to him on such a day, anno 4 Georgii, &c.

Statute of limitations
pleaded to an
assignee of
commissioners
of bankrupt-
cy.
Sira. 556.

The defendant demurred to the replication, and it was argued for him, that it was ill, because the plaintiff did not set forth how the person became a bankrupt, (*viz.*) That he was indebted to any person, &c. and absconded, or had done any other act of bankruptcy; but if he had set forth this matter, it doth not appear by the pleadings that the defendant made any promise to the bankrupt himself within six years, or that the case of bankrupts was within the saving of the statute of limitations, by which it is enacted, That actions on the case for slander must be commenced within two years after the words spoken; and all actions of trespass, of assault, battery and wounding, and false imprisonment, must be commenced within four years after the cause of suit, and all other actions on the case, actions for account, (other than such as concern merchandize) actions of debt, detinue, trespass, trover and replevin, must be brought within six years after the cause of such actions and suits, and not after.

But the right of action in the cases aforesaid is saved to infants, feme covert, non compos mentis, to persons imprisoned or beyond sea, so as they commence their suits within the times above limited respectively, after their imperfections removed; but the right of bankrupts is not mentioned.

This was admitted by the counsel on the other side for the plaintiff (the assignee); but they insisted, that the right to this action was a new right vested in him by act of parliament.

Econtra.
Cro. Car. 139,
349, 513.
Lev. 191.
2 Lev. 166.
Sid. 305.
2 Mod. 212.
Curia.

To which it was answered, and so resolved by the court, that the statute of bankruptcy transfers the right to the assignee, but it is no more than the old right which the bankrupt had before he had committed any act of bankruptcy, * and therefore the assignee must take it in the same plight and condition as the bankrupt himself had it; and so it hath been adjudged in the case of *Mason* and *Plunkett*, that the assignee was in the same condition (as to the

* P. 172.

Term. S. Trin. 9 Georgii, 1723.

right) with the bankrupt himself, and consequently if he was barred by the statute of limitations, so shall the assignee. 3 Wil. Rep. 144. S. P.

Jones *versus* Thurloe.

Inn keeper
may detain a
horse for one
night's meat.
Stia. 556.

Moor 876.
2 Rol Abr.
85, 86.

TROVER brought by a *common carrier* against an inn-keeper, for keeping the plaintiff's horse, and converting him to his own use.

The defendant pleads, that he is an *inn-keeper*, and that the carrier owed him so much money for horse-meat at several times (all which he set forth in his plea), and that by the custom of the realm, an *inn-keeper* may detain horses for their keeping; and that he, this defendant, on such a night, detained the plaintiff's horse for what was due to him, &c. which is the same trover and conversion of which the plaintiff complained, &c.

* I do not
take this to be
confined to
one night
only, but to
one single
time of so-
journing in an
inn, though it
might consist
of three, four
or many days.

And upon demurrer to this plea the court was of opinion, that by the custom of the realm, if a man lies in an *inn* * *one night*, the inn-keeper may detain his horses till he is paid for the expences; but if he gives him credit for that time, and lets him depart without payment, then he hath waived the benefit of that custom by his own consent to the departure, and shall never afterwards detain the horse for that expence.

For this custom is founded on the hardship of the inn-keepers case to sue for every little debt, or on a greater hardship, that he may not know where to find him who was his guest after he was gone; therefore when he hath waived that privilege which the law gives him, he must rely on his other agreement.

Now, in the principal case, the inn-keeper having seized this horse for the expences of *several nights*, and not for *one night*, and no more, (which he might lawfully do) such seizure is not lawful, and by consequence it is a good evidence of the conversion.

In the argument of this case the Chief Justice held, that though the *inn-keeper* might detain a horse for his meat for one night, yet he could not sell the horse and pay himself; if he * did, it was a † conversion, for he is not to be his own carver.

* P. 173.
† Vent. 71.

Wilkinson *versus* Meyer.

Where the
covenants are
mutual, a re-
quest to per-
form them is
not necessary.
Post 232. S.C.
but seems not
to be S.P.

COVENANT upon an agreement in writing for *South-Sea* stock, wherein the plaintiff covenanted by indenture to transfer the stock before the *25th day of March, or within four days after*; and the defendant covenanted to accept the same, and to pay so much money for it, *infra tempus prædict*, which he had not paid.

And

Term. S. Trin. 9 Georgii, 1723.

And upon a demurrer to the declaration it was insisted for the defendant, that here was an *indefinite time* set forth for the performance of this covenant, therefore the plaintiff ought to have set forth a *request* to perform it, otherwise he cannot be entitled to this action.

This is a *mutual covenant*, and in such case the plaintiff may Curia maintain his action without laying any *request* made by him to the defendant to perform it, or that he on his part was ready, and offered to perform it; for the time is not indefinite, as hath been suggested, because the defendant was to accept the stock, and pay the money *infra tempus prædict'*, which must be within the four days; and therefore there is no occasion of averring a request in this declaration; this case is the same with that of * *Blackwell and Nash*, * Ante 105. only in that case one day was appointed, and here are four days.

Judgment for the plaintiff.

Woolley *versus* Briscoe. Tuesday 18 June.

BY the † statute 7 Geo. it is enacted, That every contract for sale † 7 Geo. or purchase of subscriptions, or stock of the South-Sea company, cap. 1. Where the issue is immaterial, and where the defendant shall not take advantage of a bad replication. Stra. 554. which shall be unperformed, or shall not be compounded between the parties thereto, by 29 Sept. 1721, or an abstract or memorial thereof signed by the party interested therein, and who shall be intitled to take advantage of the same, shall be entered in books kept for that purpose by the company, to whose capital such stock doth relate, at some time before the first of November 1721, and in default of such entry, every such contract (as to so much thereof as shall remain unperformed, or not compounded by the 29th of September 1721) shall be void.

* The plaintiff brought an action against the defendant, to whom * P. 174. he (the plaintiff) had sold some South-Sea stock, and entitled himself to the action, by averring that he tendered the stock at the day and place agreed on, but that the defendant did not accept the same, or pay the money.

The defendant pleaded, that the contract for the sale of the said stock was not entered in the company's books, at any time before the first day of November 1720. *secundum formam statuti*, so that the said contract was void.

The plaintiff replied, that the said contract was entered, &c. before the first day of November 1720, *secundum formam statuti*, upon which they were at issue, and the plaintiff had a verdict.

It was moved in arrest of judgment, that this was an *immaterial issue*, for there is no affirmative and negative, consequently there ought to be a repleader.

To which it was answered, that the substance of this replication was, that the contract was entered *secundum formam statuti*; it is

true,

true, the day and year are mentioned, but that shall be rejected as surplusage.

" *Curia*. A plea alledging that the contract was not registred "
" *secundum formam statuti*, would be sufficient; and if so, the day "
" may be here rejected, especially being immaterial, and not pur- "
" suant to the directions of the act. This seems a reasonable con- "
" struction of this pleading, especially since there has been a verdict "
" for the plaintiff on the substance; the declaration is a good de- "
" claration, and so is the plea in substance though not in form; "
" and for want of form in his own plea the defendant shall never "
" take advantage by repleader.

Judgment for the plaintiff.

The King *versus* Ford.

Indictment
for selling ale
without li-
cence.

* 3 Car. 1.
cap. 3.
Stra. 555.
Sef. Caf. 264.
pl. 208.

THE defendant was convicted upon the * statute 3 Car. by which it is enacted, that *none shall keep an alehouse without licence*, on pain of forfeiture of 20 s. to the poor, &c.

And now it was moved to quash this conviction, because ale-house-keepers selling ale without licence are punishable by former statutes, particularly by the statute 5 & 6 Ed. 6. (*viz.*) That none should keep alehouses without a licence granted, either in sessions, or by two justices (*quorum unus*) on pain of three days imprisonment, without bail.

* P. 175.

* Now it doth not appear in this case, but that the defendant might be licensed by two justices of peace according to that statute; and if so, then this conviction ought to be quashed.

Curia.

The statute 5 & 6 Ed. 6. is intirely out of the case, because it is alledged in the indictment, that the defendant sold ale *contrary to the statute 3 Car.* and it being likewise averred, that he sold it *sine aliqua licentia quacunque*, the objection that he might be licensed by two justices is of no weight.

The King *versus* Ashton.

1 Geo. c. 48.
Conviction
for destroying
fruit-trees,
&c.
Sef. Caf. 346.
pl. 274.

THE wife of one Ashton was convicted by two justices upon the statute 1 Geo. for destroying *fruit-trees*, the punishment for which offence is, to be sent to the house of correction for three months, and to be publickly whipped once in every month during that time; and it was moved to quash this conviction, because it did not specify the punishment inflicted by that statute, for that being a particular punishment, (*viz.*) To be sent to the house of correction for three months, &c. ought to be set forth in the conviction specially, since this offence is to be heard and finally determined by the justices.

" It

Term. S. Trin. 9 Georgii, 1723.

“ It is only a conviction of the offence, *ideo consideratum est per nos quod convictus est.*

“ *Wearg contra.* There are two distinct punishments inflicted by the statute according to the circumstances of the case; for if the offence is committed where there is a house of correction, the offender is to be imprisoned for three months; and if none, then for four months in the common gaol, so that the authorities to convict and to commit are distinct.

“ No judgment is necessary; for it has been held that a wrong judgment, or an erroneous distribution of a penalty, will not vitiate a conviction.

“ *Cur.* seemed clear to quash the conviction, for there ought always to be a judgment, *quod forisfaciat*, or *quod committatur*, for † the act gives no pecuniary forfeiture.

† 2 Bur. Rep. 1166.

* Cooke *versus* Wingfeild.

* P. 176.

THERE was a *libel* exhibited against the defendant for *defamatory words* spoken by him in *London*, and after sentence, he moved for a prohibition, and obtained a rule, that the plaintiff should shew cause, &c. why a prohibition should not go.

The court will not take judicial notice of a custom after sentence.

Stra. 555.
Andr. 300.
Fortesc. Rep. 347.

And now the cause shewn why it should not go was, that it ought to appear on the face of the *libel*, that the matter is not of spiritual conusance; otherwise that court shall not be prohibited, especially after sentence; but no such thing appears on this *libel*, for the defendant only suggests a *custom in London*, that defamatory words spoken there are actionable, which ought not to be suggested, nor any thing offered in proof which is out of the *libel*, especially since the defendant hath submitted so far to the jurisdiction of the spiritual court till sentence was given against him.

If there had been any such custom, he ought to have pleaded in bar to the jurisdiction of that court, for the courts at *Westminster* are not *ex officio* to take judicial notice, that there is any such custom in *London*.

There is a difference between a motion of this kind before, and after sentence in the spiritual court, for in the one case this custom need not be proved by *affidavit*, because it is sufficiently known, but a judicial notice shall never be taken of it after sentence; so the rule was discharged.

Curia.

Huxfer *versus* Gapan.

I N *Trover for a ring*, the defendant moved for leave to bring it into court, and that it might be struck out of the declaration.

Amendment of a declaration in trover.

Term. Si Trin 9 Georgii, 1723.

Curia.
Salk. 597.

This being an action for damages founded on a supposed conversion, the motion was denied, but if it had been an action of detinue, it would have been granted.

* P. 177.

Then the plaintiff moved for leave to amend his declaration, and add more counts to it, having only declared for 15 s. damages, and this was to give the court jurisdiction; * and though this was strongly opposed on the other side, he had leave to amend.

Cro. Eliz. 79.

And per Curiam, In trover the conversion is the point in issue, for which the time and place should certainly be alledged.

The King versus Erbury.

One outlawed
for a seditious
libel may be
bailed on
bringing a
writ of error.
J. C. Fortesc. Rep.
37.

See Burr. p. 4.
v. 4. page 2530.

MR. Erbury being apprehended by virtue of a warrant from the secretary of state, for being the author of a seditious libel, was bailed to appear in B. R. the first day of Easter term last, and he accordingly appearing, it was moved by the Attorney General, that he might be committed, because he was outlawed upon an indictment at Hicks's hall, for being the author of a seditious libel, intituled, *The Clemency of the Kings of England*, and thereupon he was committed; which indictment, together with the outlawry, were removed hither by *certiorari*.

And upon another day being brought up by *habeas corpus*, he moved by his counsel to be bailed, upon stat. 4 & 5 W. & M. c. 18. in order to prosecute a writ of error, for reversal of the outlawry, which was opposed by the Attorney General, for that he was not entitled to so much favour *ex debito justitiæ*, before he had brought a writ of error to reverse the outlawry.

Then he produced some affidavits to shew that he had done all in his power to have a writ of error allowed, and that he had applied to the secretary's office for that purpose; to which the Attorney General answered, that if he (the Doctor) had made any application to him, he would have signed a fiat at any time, which he having neglected to do, such neglect ought not to be any excuse to him.

Pratt Ch. Just. was of opinion, that his outlawry was a confession of his crime, and equal to a conviction; and therefore if he had brought a writ of error, the court might have refused to bail him. " He denied it to be within the act; but Powys seemed to think that it was within it. Eyre indeed at first took it not to be within the act, (ante 100.) But he afterwards declared himself of opinion that it was within the letter and meaning: He said the general recital to the statute does seem to extend only to outlawries prosecuted in B. R. But the title of the act is general, For preventing malicious informations in the court of King's Bench, and for the more easy reversal of outlawries in the same court. And the introduction to the particular clause of this act is also general, For the more easy and speedy reversal of outlawries in

" the

Term. St Trin & Georgie, 1723.

"the said court; and so is the enacting clause, That no person
"who shall be outlawed in the said court for any cause, matter or
"thing whatsoever, (treason and felony only excepted) shall be
"compelled to come in person into or appear in person in the said
"court to reverse such outlawry; but may appear by attorney and
"reverse the same without bail in all cases except where special
"bail shall be ordered by the said court. Now without question
"an outlawry at the sessions removed into this court by *certiorari*
"is an outlawry in this court, and consequently is within the letter
"of the act: and as it is within the letter, so it is within the reason
"of the law; for there can be no reasonable difference between an
"outlawry originally prosecuted in this court, and an outlawry re-
"moved hither by *certiorari*. Besides, by a subsequent clause of
"the act the sheriff who arrests the defendant on a *capias utlaga-*
"tum may take an appearance or special bail where special bail is
"required in the action: and if the sheriff has power to bail the
"defendant in any case, without doubt this court has the like
"power," and it would be very hard if it should be otherwise;
for this man ought not always to be imprisoned for a misdemeanor
or a contempt, the outlawry being no more than a contempt of the
law, and a means to compel him to answer; and as yet he is under
* no conviction; and the bail he is to give is only to prosecute his * P. 178.
writ of error with effect.

Fortescue was strongly of the same opinion.

Then the Chief Justice desired the counsel for the defendant to
shew some colourable error to reverse this outlawry, so that it may
appear to the court it is not for delay, and to avoid justice.

But the counsel replied, that they intended to follow the common
practice, as in cases of this nature, and that they would assign errors
in fact, which probably might be confessed by the Attorney General
upon giving bail to answer the trial of the merits upon this informa-
tion.

And thereupon the solicitor for the defendant exhibited a peti-
tion to the Attorney General for a writ of error, who signed a *fiat*
in court; and then his counsel said, that they would take out the
writ the next seal-day, and that this being the last day of the term,
it would be hard to continue him in custody all the vacation, espe-
cially when it appeared to the court, that the writ of error was pro-
secuted for his discharge.

"The defendant not having bail ready in court, may be bailed at Curia.
"a Judge's chambers, shewing some error.

Harrison

Term. S. Trin. 9 Georgii, 1723.

* This case was determined in Mich. term 10 Geo. 1723.

Harrison *versus* Green. *

Non assumpsit is a good plea to an action

brought against a common carrier. See Cro. El. 470. pl. 29. Noy Rep. 56. Lev. Rep. 142. Brownl. 8. Al. 77. Com. Rep. 10. Comb. 379, 380. Carth. 371. Ld. Raym. 90. Sid. 236. pl. 3. 2 Barnes 252, 253.

THIS was an action on the case brought against a common carrier for detaining the plaintiff's goods till they were spoiled.

“ Upon *non assumpsit* pleaded, the plaintiff had a verdict; and it was moved in arrest of judgment, for that the issue and plea are improper; for *non assumpsit* is no plea to an action founded on a tort.

“ *Cur. contra.* This action is founded on the general custom of the realm, and on that *assumpsit* which is implied by law on the carrier's receiving the goods; for by his receipt of the goods he implicitly undertakes to keep and deliver them safe: and *non assumpsit* is a proper plea, and the issue is proper enough. And by Pratt Ch. Just. and Eyre Just. Judgment for the plaintiff.

* P. 179.

* The King *versus* Thorogood.

The defendant confessed himself guilty of perjury, and was put in the pillory.

THE defendant having made an affidavit in the court of Common Pleas, and the truth thereof being controverted, he was summoned to appear in court, and accordingly did appear in *Easter term* last, and confessed that he made the affidavit, and that it was false.

Whereupon that court recorded his confession, and ordered that he should be taken into custody, and put in the pillory for perjury.

And now it was insisted by his counsel, that this could not be done upon his own *confession*, because it is not a conviction, but only matter of evidence, for he ought judicially to be brought before the court by indictment, and therefore his *confession* ought not to have been recorded.

Besides, the court of Common Pleas hath no jurisdiction in criminal cases, and therefore if it had appeared on record, that the defendant was perjured, that court could not have punished him.

Econtra.

To argue that a criminal shall not be convicted upon his own confession, is not only a new, but a very strange doctrine, because the confession of a crime is the strongest proof of guilt.

It is likewise very strange to object that the court of Common Pleas hath no jurisdiction in this case, because the punishment by pillory, 5 Eliz. cap. 9. is by virtue of the statute 5 *Eliz.* and the court having given a sentence accordingly, shews, that they proceeded on that statute by which

Term. S. Trin. 9 Georgii, 1723.

which power is given to any court where the perjury is committed, to punish the offender; so that it is plain that court hath a jurisdiction, especially since it is provided by that very statute, that it shall not extend to any ecclesiastical court, which being a negative pregnant, is a full proof that all other the King's courts may punish such offenders, and even those who shall be convicted by their own confession; for the statute gives power to hear and determine by inquisition, information, bill, presentment, or otherwise, and to give judgment and award execution, &c. now by the word *otherwise*, Lev. 155. the confession of the party may be intended.

Besides, if that court cannot punish the defendant by virtue of the statute 5 Eliz. he might be punished at common law, for perjury is an offence at common law, and * any court may punish such a criminal for an offence committed *in facie curiæ*; which was the better opinion in † *Bushe's* case, though the Chief Justice Vaughan † Vaugh. 152. doubted it. * P. 180.

But notwithstanding what was said by the defendant's counsel, he was put in the pillory the last day of the term.

Hiliard *versus* Phaly & al'.

UPON a trial at bar on an issue directed out of Chancery; the question was, Whether *Mr. Hiliard*, the plaintiff's brother (who was seised in fee of the lands in question, of the yearly value of 600 l.) was married to *Sarah Phaly*, the mother and guardian of the defendant, before such a day, which was his birth-day; there were three other issues to the same purpose, she having three other sons. Evidence of marriage.

The defendant (the infant) by his mother and guardian, pleaded, that the said *Mr. Hiliard* was married to her before the birth of any of the defendants; upon which they were at issue; so that the plea being in the affirmative, the proof was upon the defendants, which was as followeth:

¶ First, It was said by their counsel, that this plea being in favour of legitimation, in such case cohabitation hath always been allowed to be good evidence; and it was in proof, that *Mr. Hiliard* cohabited with this woman above twenty years, that in such a year, &c. he came with her out of *Lincolnshire* to *London*, and lodged in *Wild-street*, where they were married by a priest who served the *Portugal* ambassador; and it was proved, that such a priest was about that time chaplain to the ambassador.

That *Mr. Hiliard* was a *Roman* catholick, and for that reason there was no body present at the marriage, or who could prove that she was actually married besides herself; but there was sufficient evidence, that he acknowledged she was his wife, and desired the witnesses to use her as such; and that on the day of his death, and

Term. 8th Trin. 9 Georgii, 1723.

381 9 * but a few hours before he died, he declared in the presence of his physician and several others (who were now produced as witnesses) that he was married to her.

For the plaintiff.

On the other side it was admitted, that this is a favourable issue, because it was to support legitimization; but it is to be favoured only where the matter is doubtful to the court and to the jury, and not where there is such clear proof to the contrary, that there can be no room to doubt.

* P. 181.

* Now the proof was, that *Mr. Hiliard* took this woman long since to be his house-keeper; that soon afterwards she was with child, and that both of them went to *London* to avoid prosecution in the spiritual court; but yet after the birth of three of these children, he was prosecuted in that court for fornication with this woman, and that sentence was given against him, and penance enjoined, and that he actually paid the commutation money.

That he ordered his servants not to call her mistress, but by her proper name, and that he frequently told his neighbours, and some of his most intimate acquaintance, that he was never married to this woman.

Then the parson of the parish deposed, That he knew this woman ever since she first became a servant to *Mr. Hiliard*, and that he always took her to be his concubine, and not his wife.

Econtra.

But to obviate the parson's evidence, there was a letter produced under his hand in very endearing words and expressions, wherein he assured her, that if she would marry him, then he would assist her to baffle all the attempts of her enemies to disprove her marriage with *Mr. Hiliard*; and being asked by the Chief Justice what could induce him to write such a letter, if he took her to be a ser-

* Lord Chief Justice Pratt, who asked him the question, married his maid servant, which the parson, it is supposed, hinted at.

vant and a concubine; the parson answered, that greater * men than he had married servants.

It was further proved on the plaintiff's side, That upon the death of *Mr. Hiliard* this woman got into her custody all the writings concerning the inheritance of these lands; and upon a bill in Chancery exhibited against her to discover the same, she answered, that she was married to *Mr. Hiliard* about three years before he died, and so insisted to keep the writings, which answer was now offered to be given in evidence; but it was opposed on the other side; for though it might be conclusive against herself, if she pretended to any dower, or to a jointure, yet it cannot be given in evidence against a third person not deriving any title under her; and the court being of that opinion, the answer was not read.

See post 182.

See post 182.

Then they offered to give the proceedings in the spiritual court in evidence, but that was likewise denied, because what was done in the spiritual court cannot be evidence at common law where the title of lands is in question.

So the jury gave a verdict for the defendants.

* But

Term. S. Mich. & Georgii, 1723

* But the Lord Chancellor thought it hard that such evidence * P. 182.
had been rejected, for as to the answer in Chancery, he said, that
it was plain, where there is any confidence or trust between the
parties, the confession of one in an answer, &c. might be given in
evidence against the other, though it might be a question whether
such evidence was conclusive, or not.

Then as to the proceedings in the spiritual court, admitting there
had been a marriage in this case, and they had afterwards been di-
vorced for consanguinity or affinity, such sentence of divorce would
have been conclusive evidence to bastardise the children born in
wedlock before the divorce; and what could be better evidence in a
court of law to shew there was no marriage, than a sentence in the
spiritual court carried on in a regular suit, and pronounced in the
life-time of the parties, that they were guilty of fornication, and
the proof of the commutation-money paid by the supposed father.

The King *versus* Powell and others.

" **M**OTION in this cause for leave to plead double, *sc.* To Double pleas
justify under the corporation, as a corporation by prescrip- denied.
tion; and 2dly, as a corporation by virtue of the charter of Philip See ante 158.
and Mary.

" *Car. contra.* The pleas are inconsistent; for after acceptance of
a charter, the corporation can never be esteemed a corporation
by prescription.

DE

• P. 183.

* D E

Term. Sanct. Mich.

Anno 10 Georgii, 1723.

The Case of The Dean of Trinity Chapel in Dublin versus The Archbishop of Dublin.

Where the
ordinary is
visitor of a
royal founda-
tion.
Stra. 536.
Fortesc. Rep.
329.

UPON a writ of error brought in the King's Bench in Ireland, on a judgment given in the Common Pleas there, the case was :

¶ The *archbishop of Dublin* libelled in the spiritual court there against the *Dean and Chapter of Trinity Chapel* there, for denying to admit him to visit them.

The defendants suggested for a prohibition, that the said *chapel* was of *royal foundation*, being first a *monastery* of royal foundation, and afterwards translated into *dean and chapter*, and being a donative, was exempted from the visitation of the ordinary. And thereupon a prohibition was granted, and that the plaintiff should declare upon it, which he did, setting forth, that this *chapel* was of *royal foundation*, and that the ordinary had no visitatorial power there, but what he had by virtue of the letters patent of creation made by *H. 8. anno 33* of his reign, by which it is expressly provided, that the *archbishop* shall have no power or control over the *deanery*, but such as he had over the *prior and convent* of the *Holy Trinity*, time out of mind, which *priory* was of royal foundation, and had time out of mind been visited by the King or his Chancellor.

* P. 184. The defendant, the *archbishop*, having craved oyer of the *letters patent of H. 8.* pleaded, that the King did farther order and declare therein, that the church of the *Holy Trinity* * should be the *archiepiscopal seat of Dublin*, as it was before, and as it used to be; and that the *archbishop* should exercise no jurisdiction there, but such as he used when it was a *priory*; and that time out of mind the said *archbishop*, and his predecessors, *archbishops of Dublin*, kept their cathedrals in this church, and that the *prior and convent* before, and the *dean and chapter* since the translation, were the chapter of the said *archbishops*, and time out of mind had been visited by them,

Term. S. Mich. 10 Georgii, 1723.

them, as occasion required, and traversed, that the *priory* was of royal foundation.

The plaintiff demurred specially, and after argument, the archbishop (the defendant) had judgment for a consultation, which judgment was affirmed upon a writ of error in the King's Bench in *Ireland*, and that judgment being about to be confirmed likewise in the King's Bench here, some objections were made as follow :

¶ This writ of error was a judgment *coram justiciariis nostris de Communi Banco Hiberniæ*; whereas the action was commenced in (a) that court in the *Queen's reign*, and thereupon this court was of opinion, that the record was not well removed; so that writ of error was abated, and a new writ was afterwards brought in this court.

(a) It seems to be no objection altho' the action was commenced in the late reign, unless it was also determined in the same reign.

And then it was objected, that the writ of error in *Ireland*, by which the cause was removed from the Common Pleas to the King's Bench there, was not good, because it was directed *Johanni Foster Armig. omitting capitali justiciario de Communi Banco*, and this being apprehended to be a fault, and not to be maintained, the defendant in error, upon *diminution* alledged, got a *certiorari* to the Chief Justice of the King's Bench in *Ireland*, to certify the record as it stood before him in that court, but he certified the record to be right; so that this appearing to be the mistake of the clerk only, it was now moved, that it might be amended; and accordingly it was amended.

Then it was objected, that this writ of error was of an error in *redditione judicii loquelæ quæ fuit in curia Annæ Reginae*, when the judgment was given in the Common Pleas in *Ireland*, anno primo *Georgii*.

To which it was answered, that the *loquela* began in the reign of the *Queen*, and the word *quæ* being a relative, shall refer to that court of the *Queen*.

The next objection was, that the writ of error to remove the record into the King's Bench in *England*, was returnable on such a day, and that the archbishop did not * appear within five terms * P. 185. afterwards, so that the cause was discontinued.

To which it was answered, that the defendant in error may come in at any time; nay, he need not come in at all till the plaintiff assign errors; it is true, he may come in if he pleases, and bring a *scire facias* to compel the plaintiff to assign errors; but this is at his election, which the court agreed, and afterwards affirmed the judgment of the King's Bench in *Ireland*; and thereupon a writ of error was brought in the house of peers, and there this cause was argued upon the merits.

¶ The case as it stands upon the pleadings is, that the archbishop of *Dublin* proposed a visitation of this *deanery*, as he was ordinary of the place; and the plaintiff in the prohibition not attending, he was prosecuted by the archbishop in the spiritual court there, and thereupon the plaintiff moved for a prohibition, and had it upon a

Term. S. Mich. 10 Georgii, 1723.

suggestion, that this chapel was of royal foundation, and therefore exempted from any visitatorial power of the ordinary.

This being the substance of the case, it was argued for the dean, that it was to be visited only by the *King or his Chancellor*, but not by the ordinary, because it was a *royal foundation*; that when this was created a deanery by the letters patent of *H. 8. anno 33* of his reign, it was provided by the letters patent of creation, that the archbishop should have no power over the *deanery*, other than what he had before over the *priory*; therefore if he had any right, he ought to have pleaded it, and to have set forth what power he had over the priory, otherwise his plea is immaterial.

Econtra.

On the other side it was argued, that this being an ecclesiastical corporation, is by common intendment subject to the visitation of the ordinary of the place, unless by the letters patent of creation there had been a visitor appointed by the founder; for all such corporations are *prima facie* subject to the jurisdiction of the ordinary, though they were founded by the crown; and so is *Corbett's* case in *Dyer* 273.

The only material point is, Whether this was a royal foundation, or not, which was not the point in the case of this *Archbishop and Dr. Harrison* some years past, who was a *prebend* of this church; for if the priory was not of royal foundation, the deanery into which it was translated by letters patent cannot be so; but if it was of royal foundation, then the translation into dean and chapter * is no prejudice to the founder, for he remains founder still, for nothing is altered but the *monastick rule and habit*; and so it was held in the † *Dean and Chapter of Norwich's case*, anno 30 *H. 8.* in which year, and by that King, the priory and convent of the cathedral church of the *Holy Trinity of Norwich*, was translated into the *dean and chapter*.

* P. 186.

† 3 Rep. 73.

Therefore if nothing is altered by the translation, then by consequence the founder is not deprived of his right of patronage, neither is the visitor deprived of his right of visitation, because it is still the same body corporate, though by another name.

The judgment was affirmed.

The King *versus* The Mayor of Tiverton.

Information against the defendant for bribery.

See Stra. 593. Post 245.

UPON a motion for an information against the defendant for bribery, at an election of a new mayor for the corporation of *Tiverton in Devonshire*; and when he found he could not succeed in the choice of the defendant (the old mayor) withdrew himself on the day of election, so that a new mayor could not be chosen, though the common council did all in their power to proceed to an election, by appearing on the stairs in the town-hall for that purpose, but the door was lock'd by the defendant (the old mayor) and

Term. S. Mich. 10 Georgii, 1723.

and a book belonging to the corporation was taken away; so that for want of choosing a mayor on the day of election the corporation was dissolved.

The Chief Justice, who was formerly recorder of this corporation, said, that there was a difference amongst the members thereof about precedency, so the rule was made to shew cause why an information should not go. Curia.

Afterwards, in *Hilary term*, it appeared that there was *bribery* on both sides, so informations were filed against both parties, and the court agreed, that *bribery* was a sufficient cause to remove a man from his office, and that it was an offence by which the very constitution of the government might be altered.

* Anonymus.

* P. 187.

UPON a motion for an information against the defendant, Information for gaming.
upon an *affidavit* of the prosecutor, who made oath that he had lost 15 l. or thereabout, to the defendant at one sitting; the words of the statute being, *ff. Any person winning at one time above the value of ten pounds, and being convicted thereof upon an information or indictment, shall forfeit five times the value, &c.* 9 Annæ cap. 14.

The counsel on the other side objected, that the prosecutor had already indicted the defendant for the same offence, and that the grand jury had found the bill, which was true; but that the defendant was not tried upon it, because it was quashed for insufficiency.

However, the court would not give the prosecutor leave to file an information, for that the grand jury had already found a bill, and though the indictment was quashed, they might find another bill for the said offence; therefore there was no reason for this court to interpose.

Crofts executor of Curtis *versus* Butel the bail of Harris.

THE case was thus, (*viz.*) "An action was brought in this court, judgment obtained, and a writ of error brought returnable in *Camerâ Scaccarii*. Two persons became bail to the writ of error before Pratt Lord Chief Justice, to which bail exception being taken, one justified himself in court, but the other did not; so that another additional bail was put in before Powys Justice at his chambers in *Serjeants-Inn Fleet-street*: on which entry before Powys the recognisance of bail was drawn up, and the judgment being affirmed on the writ of error, two *sci. fa.* were brought in *London* against the bail, and two *nichils* returned; and a *ca. sa.* against the defendant, on which he was taken and imprisoned.

Bail in what method to be taken.

Term. S. Mich. 10 Georgii, 1723.

" *Whitaker* serjeant moved to discharge the defendant out of execution, and to set aside the proceedings on the *sci. fac.*

" First, For that the entry of the recognisance is irregular: It ought to have been entered as taken before *Pratt* when the first bail was given. The bail which justified is bail from his first acknowledgment before the judge: whereas if the recognisance shall be drawn up as entered into when the additional bail was given, he can be bound but from thence; so that if between those times he has aliened his lands, such alienation is good and binding.

" Secondly, The *scire facias* is returnable on a day certain, which it ought not to be, the proceeding in the original cause being by bill.

Thirdly, The *capias ad satisfaciend'* was irregular, because by the statute † 3 Georgii, it is enacted, That the plaintiff shall mark on the back of the writ the real sum or debt due to him, before it is delivered to the sheriff to be executed; and here there was no sum endorsed on the *capias*, nor any time mentioned in the entry of this recognisance; so void.

* P. 188. * " Fourthly, The *sci. fa.* ought to have been brought in *Middlesex*, for the recognisance is filed there.

Besides, the *recognisance* is a lien on the estate of the bail from the day that it was taken, and it may be prejudicial to enter it on a future day, (*viz.*) On the day that the last recognisance was taken, because the person who entered into the first recognisance might have aliened his lands before the other was taken.

" Fifthly, No *ca. fa.* lies upon a recognisance of bail; for the tenor of the recognisance is that the debt be levied *de bonis, catallis, terris & tenementis*,

Econtra.

The defendant ought to have appeared to this *scire facias*, and pleaded this wrong inrolment, and shall not now take advantage of it on a motion; but this sort of practice of taking bail at several times, was settled in this court in the time of the *Chief Justice Parker*, and is an ease to defendants; for the first man is bail only *de bene esse*, and no bail is really given till the second man enters into the recognisance, for then it is compleat, and not before.

" And the entry of the recognisance must be entire as if taken at once; and the constant practice is to take the recognisance as if the bail were both taken at the last Judge's chambers. The inconvenience which is objected, that the land may be aliened in the mean time cannot properly be urged by the bail, since the only prejudice that can accrue thereby must arise to the plaintiff.

" As to the second objection, that the *sci. fa.* is returnable on a day certain, which it ought not to be, the proceedings in the original cause being by bill.

" The return of the *scire facias* on a day certain is good, for the proceeding on which this *sci. fa.* is founded is the recognisance,

Term. S. Mich. 10 Georgii, 1723.

“ fance, which is an intire distinct charge and record from the
“ former action; for that was determined by the judgment, and
“ that record thereby closed: but if this proceeding should be ad-
“ judged a proceeding by bill, yet it is not any irregularity, but an
“ error.

“ As to the 4th objection, the distinction is between a recogni-
“ fance taken by the court, which is of no force till entered of re-
“ cord at *Westminster*, and then it is entered as taken in court; and
“ a recognisance taken on the statute of 3 Jac. c. 8. For by that
“ act a Judge at his chambers may take a recognisance of bail,
“ which is obligatory by the caption, and gives the conuzee power
“ of election to sue in *London* or *Middlesex*. 2 Salk. 600. pl. 10.
“ 6 Mod. 42. 2 Ld. Raym. 1966. 11 Mod. 244. If this is an
“ error, it may be taken advantage of by a writ of error upon the
“ judgment on the *sci. fa.* or on the award of the execution.

“ As to the 5th objection, Formerly it was held that no *ca. fa.*
“ would lie on a recognisance of bail: but the latter resolutions
“ have been contrary, and the constant practice has been accord-
“ ingly. *Lev.* 226.

Then as to the not indorsing the sum on the *recognisance*, that
doth not make the *capias* void. The statute requires it should be
done, that an execution should not be taken for more than the real
debt, and inflicts a penalty, if it should be executed for a greater
sum; it only subjects the party to the forfeiture of double damages.

As to the last objection, the answer was, that the entry should
be in *Middlesex*, and not in *London*, but that is of bail to actions
brought in *B. R.* and not to original actions upon *recognisances*, as
this is.

If the second bail had entered into a recognisance before the Curia.
Chief Justice as the first man did, that would not have related to
the time of the first recognisance given by the other bail, and taken
before the same Chief Justice; but here the second bail entered into
a recognisance before another Judge, which makes no alteration of
the case.

A bond sign-
ed by one at
one day, and
by another at
another day,
shall relate to
the first deli-
very.

A Judge may take a recognisance of bail at his chamber, and the
entry in his book is a good warrant for the entry of it in the office,
and the practice is settled to take such recognisance at one time, and
another at another time; for the first is *de bene esse*, and no com-
pleat bail is given till the last is taken, and from that taking the re-
cognisance is made up; for such Judge before whom the last bail is
taken, signs the roll; therefore though taken by different Judges,
the * first is of no value till the last is taken, for then the bail and * P. 189.
the entry is entire and perfect, and not before.

Cro. El. 622,
623.

“ 2. The return is good and proper; for the *sci. fa.* is not
“ grounded on a proceeding by bill, but on a collateral matter.

“ 3. The *ca. fa.* is good, though it is not indorsed.

“ 4. The *sci. fa.* is well directed to the sheriff of *London*.

VOL. VIII.

B b b

“ 5. The

Term. S. Mich. 10 Georgii, 1723.

"5. The body may be taken in execution on such recognisance.
"Per Cur. Proceedings are regular, wherefore the motion was
"denied.

Williams *versus* Lyons.

The defend-
ant was
guilty of ex-
tortion.

AN action on the case was brought against the defendant for a criminal conversation with the plaintiff's wife; upon Not guilty pleaded, the cause was tried at the sittings after the term, and the jury gave a verdict for the plaintiff, and 200*l.* damages; and afterwards the defendant used some indirect means with the plaintiff to take a small sum, and release the damages, and because he would not take 30*l.* and give such a release, he (the defendant) got a warrant of a justice of peace to take the plaintiff for a pretended murder, which warrant was executed on him on a *Sunday*, and he was kept in custody till *Monday*; and then was arrested in an action of five hundred pounds at the suit of the defendant; all which was done to extort a release from him, which appearing plainly to the court, a rule was made for him and the constable, and the bailiff, and the justice of peace his clerk, to shew cause why an attachment should not go against them.

Miller *versus* Bradley.

Testatum ca-
pias founded
on a capias.

WRIT of error on a judgment in the Common Pleas, and the judgment was affirmed in *B. R.* the last paper-day of the last term; therefore the *capias ad satisfaciend'* must be returnable in this term, because the judgment could not be signed till the *quarto die post*, &c. if so, then the plaintiff having brought a *testatum capias ad satisfaciendum*, that must be irregular, because there could be no *capias ad satisfaciend'* on a judgment not signed, and by consequence nothing to ground a *testatum ca. sa.* especially this action being brought by original.

Econtra.

The objection is, that this action being brought by original, no *ca. sa.* could issue before the judgment was signed; and it being obtained the last paper-day of the last term, it could not be signed till after the *quarto die post*, &c. of this term; so there being nothing to warrant a *ca. sa.* by consequence the *testatum ca. sa.* must be irregular.

* P. 190.

* But when the judgment was signed, though in the latter end of the last term, this by relation is a sufficient foundation to sue out a *capias* the first day of the term, which will be a warrant to found a *testatum* returnable *tres Trin.* and so good.

To which it was answered, that though to some purposes the term is but one day in law; yet to other purposes, it is not so; as
for

for instance; if there be *continuances*, there can be no judgment before they are entered, and the principal case being by original, there could be no judgment entered till the *quarto die post* of the following term; so there could be no such judgment as is now set up to ground a *testatum ca. sa.* 2 Lev. 108.
Salk. 626.

This is a judgment of the first day of the term, in which it was obtained by relation, which is sufficient to ground a *ca. sa.* and by consequence a *testatum ca. sa.* and if there is no difference between an action by bill, and by original, it is regular. Curia.

As to the *continuances* being carried on from one term to another, no such thing appears on the record, so this execution is regular; it is true, if the *continuances* had been entered, no execution could be prior to such entry; and so is 2 Vent. 104. *Prince versus Slaughter*, and 2 Lev. 176. *Dobson versus Bell*.

Whitley versus Loftus.

COVENANT on an indenture of *apprenticeship*, wherein the plaintiff covenanted with the father and son (the apprentice), and they on the other side covenanted with him (the plaintiff), and this action was brought jointly against the father and the son; for that the son had covenanted faithfully to accompt at his master's (the plaintiff's) request, for all such of his master's (the plaintiff's) goods as should come to his hands; and the breach assigned was, that the defendant (the son) had not accompted, &c. Father and son bound, that the son who was apprentice should accompt.

Upon *non infregerunt conventionem* pleaded, the plaintiff had a verdict; and now it was moved in arrest of judgment:

(1.) That the declaration was ill, because the plaintiff did not set forth any *request* made to the son to accompt, which he ought to have done, that the defendant might have an opportunity to traverse it.

“Another objection was, that the plea is too general, two breaches being assigned. Besides, it is no plea, for one breach is “in the negative, that he did not accompt.

“To which it was answered, that the breach is laid in this manner, that he did not accompt; *ratione cujus* he broke his covenant, which is an affirmative. Besides, this is an exception “taken by the defendant to his own plea, and is after a verdict, “which cures an informal issue.

* Besides, this being a joint action against the father and the son, and the breach assigned only against the son, cannot maintain this judgment. * P. 191.

Neither ought the action to be brought against the father, for he did not covenant, that his son should truly *accompt*, &c. he only covenanted for himself separately, to pay the money which he was to give to the plaintiff for taking the son apprentice; and the clause

Term. S. Mich. 10 Georgii, 1723.

clause in the latter end of these articles is in the singular number, (*viz.*) That each of them (the father and son) binds himself for the true performance thereof; so that the father cannot properly be said to be bound for his son, but only for himself.

Econtra.

It was argued on the other side, that this was a *covenant* entered into by the master (the plaintiff) on one part, and by the son with the consent of his father on the binding part, but by both father and son as to all other purposes; for though the son is only bound apprentice, yet they both covenant for the true performance of all covenants, &c. the words in the close of the articles being, (*viz.*) That each of them binds himself, &c. for the true performance of all the covenants and agreements therein mentioned.

And even from the nature of these covenants, the father is always bound for the son; for otherwise masters could not rely on the covenants of their sons, who are commonly under age, and so by law not capable to consider what covenants to make; and consequently in this case the father shall be taken to covenant for the performance of his son's part as well as his own.

Curia.

The court was of opinion, that the very end of binding the father was to answer the wrong which might be done by the son to his master; therefore he (the father) must be obliged for his son's true performance of the articles; it is a joint covenant, and amounts to the same as if it had been in this form: *It is agreed between the parties, that, &c.* it is true, at the end of the articles the covenant is in the singular number, (*viz.*) That each of them did bind himself, and it must be so where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted, that the covenants may be taken distributively, (*viz.*) That each of the covenantors should perform his part; the latter part makes the former covenants joint or several; and this makes the covenant of the son bind the father, who covenanted for him as well as for himself. The plea and issue is good after a verdict.

So the plaintiff had his judgment.

* P. 192.

* The Lord Coningsby *versus* Steed.

Coroner being
in contempt,
was committed.

A Rule was made, That the coroners of the county of *Hereford*, and the high bailiff of the franchise of *Lempster* in the said county, should shew cause on such a day why an attachment should not issue against them; the case was as followeth:

J. The defendant *Steed* is an attorney of this court, and formerly high bailiff of the liberty or franchise of *Lempster* aforesaid, and then he entered into a bond of 500*l.* for the faithful execution of the said office; but falling under the displeasure of the plaintiff, he brought an action of debt against *Steed* upon the said bond, and sued out a *latitat* directed to the sheriff of that county, to which writ

one

Term. S. Mich. 10 Georgii, 1723.

one of the coroners was attorney, and solicited the sheriff for a precept to the high bailiff of the said franchise, to make a warrant to apprehend the defendant *Steed*, who having brought his writ of privilege as an attorney of this court, and the sheriff having returned it upon the *latitat*, he would make no precept to the high bailiff, &c. Thereupon the plaintiff brought an *alias latitat* directed likewise to the said sheriff, who still refused to grant such precept as aforesaid, because of the privilege of the defendant, which he (the sheriff) had returned on the first *latitat*; then an original was sued forth, directed to the coroners, who accordingly made a precept to the high bailiff (who was privy to all these proceedings) and then he issued forth his warrant to the under-bailiffs, who arrested the defendant, and still keep him in custody.

And now the court was moved for an attachment against the coroners, and the high bailiff and under-bailiffs, for a great oppression, and for an abuse of the process of this court, under a pretence and colour of justice; and a rule being made for them to shew cause why an attachment should not go;

It was insisted on their behalf by their counsel, that though it was wrong to sue out this *latitat* directed to the coroners, yet they being officers who are to execute the process of this court, are not to dispute or question, whether the writ is issued lawfully, or not; neither are the *high bailiff* or *under-bailiffs* to do any such thing, but all of them are to obey the writ; and if so, then the *affidavit* of the * defendant charges them with no crime, but only in obey- * P. 193.
ing the process; which is so far from being an offence, that it is probable, if the defendant had brought an action of false imprisonment against the coroners and the rest, &c. they might have justified under this writ and warrant.

A writ is never directed to the coroners where the sheriff (who is Curia. the proper officer) stands indifferent; and it was admitted on all sides in this case, that the sheriff was indifferent, so that the matter seems to be very suspicious against the coroners and the high bailiff, (*viz.*) That they were privy to this oppression, therefore the rule was absolute as to them, but discharged as to the *under-bailiffs*.

Afterwards, on the last day of *Hilary term* following, one of the coroners was brought up in custody into court, and bailed, the other being bailed before, to answer upon interrogatories the next term.

And accordingly *Edwards*, one of the said coroners, and *Carpenter* the *high bailiff*, were brought into court, the other coroner *Landen* being in the King's Bench; and *Edwards* deposed, that he knew nothing of this oppression, nor acted therein otherwise than by a general power he gave to the other coroner *Landen*, to put his (the said *Edwards's*) name to all writs that came to him, directed to the coroners, &c. and that he never saw this writ.

Thereupon his counsel moved that he might be discharged; for if one coroner gives the other authority to put his name to a parti-

cular writ, that might probably be a contempt to this court, because he might know the nature of such a single writ; but where such a general trust or power is reposed in one coroner by another, as to set his name to all writs which shall come to his hands, there cannot be so much as the least suspicion of any contempt.

Curia.

This general authority must be intended to do all legal acts, so that if the other coroner to whom it was given abuses it, such abuser cannot be a contempt by that coroner who gave the power; therefore this appearing to be the case of *Edwards*, one of the coroners, he was discharged.

But *Carpenter*, the *high bailiff*, having owned, that what he had done was by order of the plaintiff, and that he did it knowingly, though he did not advise the doing it; so that he being in contempt, was committed.

* P. 194.

* Anonymus.

No prohibition to the Admiralty court after sentence, but for cause apparent on the record.

“ **P**ROHIBITION was moved for to the court of Admiralty
 “ upon affidavit that the cause of action did not arise on the
 “ high sea.
 “ But was denied *per cur.* because sentence is passed; and then
 “ no prohibition ought to be granted but for some cause apparent
 “ on the face of the record.

The King *versus* Bail of Strudwick.

The bail are not discharged till a commitment of the principal is entered.

* P. 195.

UPON a motion that the recognisance entered into by the bail of one *Strudwick* might be estreated, the case was :
J. Strudwick, who was the principal, gave a recognisance with bail, conditioned to keep the peace for a year, and afterwards to appear in this court on the first day of this * term, which he did not; and therefore it was moved, that his recognisance might be estreated, so that the bail might be prosecuted.

It was insisted for them by their counsel, that this motion was irregular, because there was no *default of Strudwick's appearance entered*, and the court being of opinion, that it was improper to offer any thing against the bail till the default of the appearance of the principal was entered, and if they had any thing to offer, the time would be when a *scire facias* was sued out, and it could not then be done till the default of appearance as aforesaid was entered.

Afterwards *this default of appearance, &c. was entered*, and then the recognisance being estreated, a *scire facias* was brought against the bail; and it was insisted for them, that since the said recognisance was given, the defendant *Strudwick* had entered into another recognisance to appear and answer an information exhibited against him;

him; upon which he was afterwards convicted, and committed to the *Marshalsea*, so that he being taken out of the custody of the bail by a legal process of this court, by that means they are discharged, and that he could not be brought up, and rendered by them, because he was escaped out of gaol.

It is true, there was no *committitur* of the principal entered, and if for that reason the court should be of opinion, that the bail were not discharged, then it was moved, that the proceedings upon the *scire facias* might be stayed till the common day of *estreats*, because the bail might have an opportunity of retaking him within that time.

The Chief Justice held, that where a man is admitted to bail, he is by intendment of law in their custody, but when he is taken from them by the process of this court, then they are discharged. Curia.

All the other judges were of a contrary opinion, (*viz.*) that they are not discharged till the *committitur* of the principal is entered; for though he was committed upon the conviction on the information, he was as much in the power of his bail, as if he had been at large, or still in their custody; for upon a motion in this court, they might have him brought up at any time, and rendered back again in discharge of themselves.

Afterwards upon another day, it was moved that the *committitur* of the principal might be entered, so as the bail might take advantage thereof, and that the proceedings on the *scire facias* might be stayed in the mean time.

* The court would not stay the proceedings on the *scire facias*, * P. 196. but ordered that a *committitur* should be entered on the right recognisance, for there being two, (*viz.*) One for the peace, and the appearance of the principal, which was forfeited for his not appearing; and the other for his appearance to answer the information, upon which he was afterwards convicted; the *committitur* must be entered on the last recognisance.

Parr *versus* Purbeck.

IN an action of covenant for non-payment of rent reserved upon a lease for years, there was judgment against the defendant by default; and upon a *writ of inquiry* executed, the jury gave the plaintiff but one shilling damages and no more, though he proved that the defendant owed him 150*l.* for rent. Where a writ of inquiry may be set aside, where not.

The reason why the jury gave a shilling and no more was, for that the defendant took this lease of the plaintiff of a certain piece of ground, in which he (the lessee) covenanted to pay so much rent; and the lessor covenanted, that he should have such a sewer or dam to keep water, he (the lessee) intending to set up a paper-mill, but the commissioners of sewers had made the water-course so narrow,

row, that he could not have water sufficient for his purpose; and being unwilling to sue the lessor upon this covenant he left the land to the lessor; and thereupon another person entered, and was possessed thereof, and set up a corn mill, and the miller paid the rent; and all this being known to the jury who were of the neighbourhood, they gave the plaintiff a shilling and no more.

And now it was moved to set aside this writ of inquiry for the smallness of the damages; for since this action of covenant was brought, and the breach assigned for non-payment of so much rent in certain, the jury were obliged to find the whole; it is true, if it had been in an action for damages, they might have found part only; and it is usual to set aside a writ of inquiry for smallness of damages where no manner of evidence is given why they should be mitigated; which is this case.

† See postea
213. Parr v.
Niblett.

Econtra.

* P. 197.

2 Salk. 647.
pl. 17.

The counsel for the defendant insisted, that the execution of a writ of inquiry is not to be set aside, and a new writ of inquiry granted for the smallness of damages given * by the first jury, unless there is some contrivance or sinister management, and so is the case in *Salkeld Rep.* 647.

¶ In covenant to pay a *sum certain* (as in the principal case), and that upon default of payment, it should be lawful for the covenantor to enter and take the profits, &c. The defendant pleaded in bar, that the plaintiff did enter and take the profits; and upon a demurrer to this plea, the plaintiff had judgment, and a writ of inquiry, and small damages; and upon a motion, a new writ of inquiry was awarded, because an action of debt might have been brought upon this covenant, it being to pay a certain sum, and in such action the jury upon a writ of inquiry must have given the whole sum, unless the defendant proves something in mitigation, which was not done in that case; therefore the court looking upon it to be a contrivance of the jury awarded a new writ of inquiry; yet they held it to be a common rule, that no new writ of inquiry shall be granted for too small damages, if there was no contrivance in the case; for if it should, this inconveniency might follow, (*viz.*) The small damages given by the first jury might influence the second jury to give greater.

Coria.

The court was of opinion to set aside this writ of inquiry, for though the supposed breach of covenant (on the plaintiff's side) was true, (*viz.*) That the defendant had not sufficient water to set up his paper-mill, and that had been given in evidence to the jury on the writ of inquiry; yet they could not have mitigated the damages on that account, much less when it was not given in evidence.

It is true, the lessee left the land for that reason, and another entered and possessed it, which entry, &c. might have been given in evidence upon the trial of an issue joined, but not to a jury upon a writ of inquiry after a judgment by *nil debet*, neither did the defendant give it in evidence to the jury, but pretends they knew it themselves.

It

Term. S. Mich. 10 Georgii, 1723.

It is admitted, that in covenant where damages are to be recovered, the jury upon a writ of inquiry are the proper judges of the *quantum* of the damages; and for that reason the court will not set aside their inquiry, where they give small damages; but it is otherwise where the covenant is for payment of money, and the sum is ascertained, because in such case the sum being certain, the jury cannot lessen the damages; and this is the constant difference in such cases, and it is the same as if an *assumpsit* had been * brought * P. 198. for money upon a note under hand, for there the jury cannot mitigate the damages; if they do, the court will set their verdict aside; and so it was done in the principal case upon payment of costs, &c. See *postea* *Parr* versus *Niblett* S. C.

Anonymus.

THE plaintiff brought an action in the court of Common Pleas, and laid four counts in his declaration; the defendant demurred to one of them, and the plaintiff joined in demurrer, and had judgment, and then he entered a *nolle prosequi* as to the other three, but without any *misericordia*, which the defendant believing to be erroneous, he brought a writ of error in B. R. and assigned this matter there, being a precedent in * *Coke's Entries*, that it is erroneous. Where non pros was entered without a misericordia. *Co. Ent. 676.

It was argued in support of this judgment, that by the statute of *jeofailes*, 16 Car. 2. no judgment after verdict, &c. shall be reversed for want of a *misericordia*; and by the † statute for amendment of the law, it is enacted, that no judgment shall be reversed, or writ of inquiry of damages stayed or reversed by reason of any matter which would have been aided by any statute of *jeofailes* in case of a verdict, so as an original writ, or bill or warrant of attorney is filed. Econtra. 16 & 17 Car. 2. c. 8. † 4 & 5 Ann. cap. 16.

Now the want of a *misericordia* is matter which is aided by the said statute of *jeofailes* in case of a verdict; and therefore it is within the aforesaid act made for the amendment of the law; and the judgment is not to be reversed where that word is omitted.

If the entry of a *misericordia* had been necessary at common law, there is no statute of *jeofailes* which cures the want of such entry; for those statutes extend to judgments entered by *confession*, *nil dicit*, or *non sum informatus*, but the principal judgment is neither of these, for it is a judgment upon a *demurrer* joined.

Now at common law there was no need of entering a *misericordia* in such cases, because such entry is only *pro falso clamore*, and here is no colour of any false complaint, because the plaintiff says *non vult ulterius prosequi*; and as for that case in the *Lord Coke's Entries*, many of them have been condemned; so the judgment was affirmed.

* P. 199.

* Clarke *versus* Cornish,

or

Cornish *versus* Clerke & al'. Wednesday 26 Nov.

Scire facias brought against the bail jointly, and a several judgment against each of them.

THE case, *ff.* Two persons entered jointly and severally into a recognisance of 4000 l. bail for another; and afterwards the plaintiff brought a *scire facias* against both of them jointly, and had two *nibils* returned; on which plaintiff prayed execution against each for the whole debt, which was awarded accordingly.

And now it was objected, that execution ought not to be awarded against each for the whole debt, because a several judgment cannot be given upon a joint *scire facias*, no more than upon a bond.

It is true, a recognisance may be joint and several (as this was), and such a recognisance may warrant a joint and several *scire facias*; but yet a several judgment can never be had upon a joint *scire facias* against each of the cognisors; for the plaintiff might have brought a *scire facias* against each of them separately, and not against both jointly.

Curia?

The court was of opinion, that this was the constant form, and so the judgment was affirmed.

" For if the award of the execution be joint, yet the plaintiff
" may have several executions; and though the *sci. fa.* is joint
" against both, yet the execution may be several, for as the recog-
" nissance is joint and several, to compel the plaintiff to bring two
" *sci. fa.* would be only to multiply actions. See *Sid.* 339.
" *Lev.* 225.

* It was first argued in this term, and adjourned, then in Trin. 10 Geo. Saturday 20 June 1724.

* King & Ux' *versus* Basingham.

Where the wife shall not be joined in the action with her husband. See post 341.

AN action on the case, &c. was brought in the Common Pleas by husband and wife, in which he declared upon several counts, and one of them was for money lent to the defendant by him (the plaintiff) and his wife, by his consent, and promise made to them both.

Upon *non assumpsit* pleaded, the plaintiff had a verdict; and it was moved in arrest of judgment, that the declaration was ill, because the wife was joined in this action with her husband, which she ought not to be; and that the joining her in the action being matter of substance, was not helped by this verdict; for by this means if the husband should die, then what is recovered would survive to her, when it ought to go to the executor of the husband.

But the judgment was affirmed, and a writ of error being brought in *B. R.* the same objection was made there; and that this action was founded on a contract made by the wife, when by law she cannot make any contract during the coverture.

Sid. 346.

"*Lee* excepted to the declaration, for that the money being alleged to be lent by husband and wife must be presumed to be lent during coverture: and then the money is the husband's money only, for which he alone ought to have brought his action; for a wife can have no interest in money during coverture. *Cro. Jac.* 644. pl.

* It was argued in support of the action, that this objection came too late, it being after a verdict; and that it ought to be made good, if by any construction it might; therefore it shall be intended that the husband and wife were joint traders, and that she lent the money to the defendant before marriage.

Econtra.

* P. 200.

Besides, where a promise is made to the wife, if the husband brings the action for himself and his wife, he makes that promise good by his own consent.

Cro. Eliz. 61.

Cro. Jac. 77.

205.

Roll. Abr. 32.

Sid. 25.

2 *Sid.* 128.

Allen 36.

2 *Mod.* 217.

"*Chief Justice.* If the money was lent during coverture, the declaration is false, because then the wife could have no money.

Adjournatur.

Wrotham Parish versus The Parish of St. Olave.

THE case, *J. John Richards*, and his wife and five children, were removed by an order of two justices, from the parish of *Capell* to the parish of *Wrotham* in *Surrey*, that being adjudged to be the last place of their legal settlement; and afterwards upon an appeal to the next quarter-sessions, that order was quashed, and thereupon the poor man and his family came back to the parish of *Capell*, and by another order were again removed to *Wrotham*; which order being removed into *B. R.* by *certiorari*, it was by the consent of both parties referred to the judge of assise, who, upon hearing the evidence on both sides, directed, that the matter should be tried upon a feigned issue, which was done accordingly at the next assises, and the parish of *Wrotham* had a verdict; and so both the former orders were quashed.

Attachment against parish-officers for a contrivance in settling a poor man and his family.

But the parish of *Capell* being dissatisfied with this verdict, procured the parish-officers of *St. Olave* in *Southwark*, to permit this man and his family to dwell in a tenement there, on purpose that they might remove him to *Wrotham*, and accordingly they came into the parish of *St. Olave*, and lived there some time, and were afterwards removed from thence by an order of two justices to *Wrotham*, which order was confirmed upon an appeal to the next sessions, so that by this means the parish of *Capell* was discharged of him, because * an order confirmed upon an appeal, makes a good

* P. 201.

settlement

Term. S. Mich. 10 Georgii, 1723.

settlement in that parish by whom the appeal is brought, against all other parishes whatsoever.

It was now moved that this last order might be quashed, and for an attachment against the churchwardens, &c. of Capell, for this contrivance.

Curia.

But the court would not quash the order, but made a rule for them to shew cause on such a day why an attachment should not go; and probably when they come to shew cause, they may consent to have the orders quashed; but they shewed no cause, and so the rule was made absolute.

The King versus Jones.

Verdict given upon an information in nature of a *quo warranto*, whether it may be set aside; all the Judges of England equally divided.

THIS was an information in nature of a *quo warranto* against Jones and Powell, for pretending to be *burgesses of Brecknock in Wales*, and to shew by what authority they claimed to be *burgesses, &c.*

Upon Not guilty pleaded, the cause came on to trial at the assizes in Hereford; and upon hearing the evidence, the counsel for the King desired that the matter might be found *specially*, for that it appeared by the charter of this corporation that the *burgesses*, and all other officers thereof, should be chosen *de Inhabitantibus*, and that the defendants Jones and Powell were not inhabitants of Brecknock.

But there being evidence given, that the usage had been against the charter, the jury gave a general verdict upon the usage, (*viz.*) That the defendants were not guilty.

And now it was moved to set aside this verdict, for two reasons; first, Because it was given against evidence; and secondly, Because the jury refused to find a *special verdict*, which they ought to have done when it was required; and because of the difficulty of the case, this question was * referred to all the Judges of England.

* This reference was not in the present case, but in the case of the Mayor of Shalisbury.

§. Whether a verdict, by which the defendant is found Not guilty on an information in nature of a *quo warranto* could be set aside, and a new trial granted; and the Judges were equally divided, two against two in each court, so that not one court was unanimous in opinion of either side; but six of them were of opinion, that the verdict might be set aside, and six were of a contrary opinion.

* P. 202.

Curia.

Verdict in a criminal cause cannot be set aside.

* And it being now moved again to set aside this verdict for the reasons before-mentioned, the court was of opinion, that since this was become a question, Whether it could be done, or not, it ought to be determined; that it was certain a verdict in a criminal case could not be set aside for finding against evidence; but then the question will be, Whether this case is criminal.

And as to the other reason for setting aside this verdict, which is, that the jury refused to find the matter *specially*, there seems to be some colour in it; for upon such refusal, even a verdict given by a *special*

Term. S. Mich. 10 Georgii, 1723.

special jury, and upon a trial at bar hath been set aside; and certainly it will not be denied, but that a misdemeanor of a jury will avoid their verdict; and it is a misdemeanor in them to refuse the finding a special verdict when desired, because every man hath as much right to have a point of law determined by the Judges, as he hath to have any matter of fact tried by a jury; and it would be unreasonable, that it should be in the power of any jury to hinder the trial of matters in such a due method as the law prescribes; therefore a rule was made, that the plaintiffs should shew cause why this verdict should not be set aside.

And upon another (a) day the counsel for the defendants offered the following reasons why this verdict ought not to be set aside, and a new trial granted.

For the defendants, why the verdict should not be set aside.

(a) The first account to be found of this case is in Hil. 10 Geo. towards the end of the term, at which time the defendants came to shew cause.

First, For that it was never yet determined that any court could set aside a verdict, or grant a new trial where the defendant was acquitted in a *quo warranto* brought against him for usurping any franchise; and an information in nature of a *quo warranto* is a criminal prosecution, in which prosecutions the court will never set aside any verdict, and grant a new trial.

It was so adjudged in the case of *The (b) King and Read*, which was an information against the defendant for perjury, in giving false evidence at a trial of a cause in *B. R.* he was acquitted upon the information; and upon a motion for a new trial upon an affidavit made, that some material witnesses to prove the perjury were absent, it was not granted.

(b) T. Raym. 34. Lev. 9. S. C. Sid. 149, 153. S. C.

The case of (c) *The King versus Sir John Jackson*, went farther than any case of this nature, which was an action of trespass brought by the plaintiff *Jackson* against one *Primate*; and the plaintiff had a verdict, with which the defendant *Primate* being not satisfied, he indicted the witnesses * of the plaintiff for perjury; which being ready for trial, *Sir John Jackson* ordered his servants to beat and imprison those witnesses who were to prove the perjury, so that they could not be at the trial; and thereupon the defendants were acquitted.

* P. 203.

Now though all this matter appeared to the court, upon a motion for a new trial, it was not granted, because it was in a criminal case in which the parties were acquitted; but an information was ordered against *Jackson* who was convicted and fined.

And this is likewise a criminal prosecution in the very nature of it; it is true by the statute of Queen + Anne, a man is admitted to try his private right in an information; the words of which statute are, (viz.) If any man shall usurp an office in a corporation, it shall be lawful for the proper officer of the King's Bench court to exhibit an information against him in the nature of a *quo warranto* at the

+ 9 Annae cap. 20.

relation of any person desiring to prosecute, who shall be mentioned in such information as relator against such usurper; and to proceed as usual, &c.

And though by that statute, an information hath the quality of a civil action, (*viz.*) If the defendant shall be found guilty, he shall pay costs; and so likewise shall the relator, if judgment be given against him; yet still the prosecution is for an offence of a mixt nature, and the civil part cannot be tried without the trial of the criminal part; and there is no difference between an *information in the nature of a quo warranto*, and an *information meerly criminal*, as to the setting aside a verdict in either.

And hitherto such informations have been accounted criminal prosecutions, and that by the plain opinion of the legislature; for it is well known, that actions *qui tam*, &c. informations and indictments are excepted out of the statute of *jeofailes*; and the reason is, because those are all criminal prosecutions, and for that reason they would not have extended to *informations in nature of a quo warranto*; and therefore it was expressly provided by the legislature, that all statutes of *jeofailes* shall extend to such informations.

9 Ann. c. 20.
For the amendment of
the law.

It is true, upon the first motion of this matter in court, there were some other reasons offered for setting aside this verdict, for some other misdemeanor of the jury, (*viz.*) That after one of them was sworn, and had heard part of the evidence for the prosecutor, he went out of the hall to make water, and was absent about two minutes, and but ten or fifteen yards distant; and that when they all withdrew * to consider of a verdict, and could not agree, they all consented to poll, and to find for that side on which the majority should fall, and that seven polled for the defendant; and thereupon they found a verdict for him.

† As the jury-
man himself
swore by affi-
davit.

* P. 204.

Now as to this matter, it is of no weight to set aside this verdict, it was not so much as mentioned when the verdict was brought in, nor was any exception made by the Judge (who tried the cause) to any of the jury who were impanelled to try the like issue the next day, between *The King* and *Powell*.

The chiefest reason for setting aside this verdict was, that it was given against evidence, and their refusal to find a special verdict when required; for it being expressly provided by their charter, that the burgesses of this corporation should be chosen *de inhabitantibus*, but the usage being contrary, they gave a general verdict upon the usage, when they ought to have found the matter specially.

Now in answer to the first reason, it is the constant rule never to set aside a verdict for being against evidence, unless it was insisted to be so at the trial, especially after a defendant is acquitted; and then as to the other reason, (*viz.*) their finding against the express provision of their charter, when they ought to have found that matter specially, they might have cured it by special pleading, if they had thought it proper so to do.

But this is not a finding against their charter, because those persons who lived within such precincts, and had usually been chosen *burgesses*, and exercised other offices in that corporation, may properly be said to be inhabitants thereof within the meaning of this charter; therefore this court without some extraordinary inducement, or great inconveniency shewn, will not make a precedent to take away the plea of *autrefois acquit* from the subject, which is a fence allowed by the common law against the insults of power.

On the other side it was argued to set aside this verdict, that an information in nature of a *quo warranto* was not a *criminal*, but a *civil prosecution*; it is true, the * statute is, that if the defendant is found guilty of an *usurpation*, the court may *fine him*; but that doth not make it a criminal prosecution, because the *fine* is only a consequence, that the right was not in the person who is to pay it; for the right is the only thing, and probably for that reason the counsel on the other side did not so much as mention the *fine*.

Econtra to
set aside the
verdict.
*9 Ann. c. 20.

* That which was now principally insisted on was, the finding * P. 205.
against the express words of the charter, which appoints that the *burgesses* shall be chosen *de inhabitantibus* of the corporation, when the defendants were not inhabitants thereof; it is true, the charter confirms the usages there, but it cannot confirm such usages which are against the express words of the charter itself.

So that the question is, Whether persons who are not inhabitants of the corporation could be good *burgesses* thereof by *usage*, which ought to have been found specially, because the usage being inconsistent with the charter, must for that reason be quite destroyed, as in the case of *The King and Philips*, where there were two charters, and the last contrary to the first, it was resolved that the first was merged in the last.

So in the principal case, though it had been an ancient usage to choose *burgesses* not dwelling in that corporation, yet such usage must be merged in the charter, for that abrogates all the usages and customs which are inconsistent with the charter; and therefore they can never subsist against it.

As to the *misdemeanor* of a juryman, it is true, if he eats or drinks whilst the verdict is under consideration, he may be punished, but that doth not make it void, though it is otherwise if he absent himself, because he cannot hear all the evidence, so as to be rightly informed of the whole; for no man knows what part of an argument, or what sort of evidence may convince him; therefore he ought to hear the whole, because one part may either strengthen or weaken the other.

Besides, the *polling* by the jury is like the *fillip of cross and pile*, if *cross* for the plaintiff, if *pile* for the defendant; and certainly where verdicts are given by the majority of the poll, they cannot be given upon due consideration of the cause; therefore if there was nothing else in the case, that is a sufficient reason to set aside this verdict;

Term. S. Mich. 10 Georgii, 1723.

verdict; but it could not be objected at the trial, because this misdemeanor was not then known.

As for the case of *Sir John Jackson*, who ordered his servants to beat and imprison *Primate's* witnesses, because they should not be at a trial to prove *Sir John's* witnesses guilty of perjury; and thereupon those witnesses were acquitted, and no new trial was granted; it is true, this is reported in *Levinz*, but there is no clear reason to support the judgment given in that case; it is no more than for a man to be discharged of one crime by committing another; for the

* P. 206. * defendants in that case were acquitted of *perjury* by beating and imprisoning the witnesses who were to prove it at a trial ready to come on, and no *new trial* was granted, because it was in a *criminal case*; but admitting it to be so in a case merely *criminal*, it is not so in an *information in nature of a quo warranto*, for if it should, it would be of the utmost ill consequence to all corporations, and it might endanger our very constitution.

But it is not a settled rule, that a *new trial cannot be granted in a criminal case*, where the defendant hath been *acquitted*; for if the acquittal was upon a trial without due notice, certainly a new trial might be granted, and the rather because no *bill of exceptions* will lie where the crown is concerned in the prosecution.

Curis.

The court first answered the objections, and said, as to the misbehaviour of the juryman who was absent for two minutes, it was not punishable, but if it was, it shall not avoid the verdict: and as for their *polling* and giving a verdict where the majority fell, *per Pratt Ch. J.* it is not like the case of the *fillip for a shilling*, if cross for the plaintiff, if pile for the defendant; because that was a verdict which depended merely on chance; but the * polling was only giving credit and weight to the authority of the greater number of the jury.

* Fortescue J. was of a contrary opinion, and said polling was little

better than chance, that it was against the design of the institution of juries; and it was like the case of cross and pile; for the jury should convince one another by good reasoning.

As to the objection, that the jury should have found a *special*, and not a *general verdict* upon the usage, it doth not appear, that the judge who tried the cause directed them to find the matter specially; for he might think that there being no negative words in the charter to exclude their ancient usages, that such customs and usages which they had before the charter did still subsist; so that this discharges them from the imputation of finding against the directions of the judge; but if he had directed them to find the matter *special*, in such case they ought to find it so, because every subject hath a right to have a point of law determined by the court, and not to have it huddled up in a general verdict by a country jury.

* P. 207. * The objection which goes to the whole is, that a *new trial cannot be granted in a criminal cause where the defendant is acquitted*; now, whether it may be granted, or not, is a question fit to be considered.

Term. S. Mich. 10 Georgii, 1723.

considered. It is true, it is generally held that it cannot; and so it was adjudged in *Sir John Jackson's* case; but that is a very extraordinary case, for it is inconsistent with reason not to grant a new trial where a man is acquitted by his own artifice of a crime not capital, for it is (as hath been observed), that where a man hath committed one crime, he shall have it in his power to avoid justice by committing another.

But admitting that case to be law, then the question will be, Whether a prosecution by *an information in nature of a quo warranto*, is a criminal cause, or not: upon which question the Judges of *England* have been equally divided.

“ *Pratt* Chief Justice. If this is not to be looked on as a criminal prosecution, I should readily grant a new trial. This lately ^{21 Vin. Abr. 480. pl. 17.} has been made a question, and was referred to all the Judges, who were equally divided in opinion, six against six, and each court was also divided: I was for a new trial.

“ *Fortescue* Just. I was against a new trial, and am so still: indictments are sometimes used only for trying a right, and yet it was never pretended to grant a new trial in them. It is objected that this is a mixt sort of a prosecution, and not intirely criminal: if so, still it is criminal. It is objected that the fine imposed is always small, but it may be large.

“ *Raymond* Just. These informations are only methods to try the right, and ought to be looked on as civil actions; and though a fine is imposed, yet that makes no alteration; for sometimes in actions confessedly of a civil nature a fine is set, as in actions of trespass *vi & armis*. This is my present opinion: but I would advise.

“ The court was of opinion, that the verdict was against law; for the charter is to be understood negatively *de inhabitantibus*, and so destroys the usage: and where a jury bring in a verdict against law, agreeable or not agreeable to the direction of the judge, the verdict ought to be set aside.

* But afterwards, on the last day of *Hilary term* following, the ^{Judgment.} Chief Justice declared, that it was the opinion of the whole court * P. 208. to grant a new trial, if it could be granted by law; but it being a point wherein the Judges had so much differed, it ought to be well considered, because it affected all the corporations in *England*; and that it was never yet known, that a verdict was set aside, by which the defendant was acquitted in any case whatsoever upon a criminal prosecution.

Turner *versus* Turner.

S. C. in Chan.
Stra. 708.
Sel. Caf. in
Chan. 49.
2 Wil. Rep.
297.
2 Eq. Caf.
Abr. 238. pl
a8.

THIS was a trial at bar upon a feigned issued directed out of Chancery, wherein the only question was, Whether *David Turner*, the grandfather both of the plaintiff and of the defendant, had cancelled a will made by him in the year 1716, or not.

The case was thus: *Jf. David Turner* being seised of gavelkind lands in Kent, to the value of 400 l. had issue *George Turner*, his eldest son, by one venter; and *David Turner* his youngest son, by another venter, both of which sons died in the life-time of their father *David Turner*, the testator.

George, the eldest son by the first venter, left issue the now plaintiff, and *David*, the eldest son by the second venter, left issue the defendant; and *David Turner*, their grandfather, anno 1716, made a will in favour of *George* his eldest son by the first venter, which, as was insisted on by the plaintiff, was not cancelled by the testator in his life-time, but by the now defendant after the death of the said testator, that the estate might equally descend between them.

But upon full proof, that the testator cancelled his will in his life-time, and said, that he intended his estate should equally descend and come to both his grandchildren, the defendant had a verdict.

The King *versus* Burchet and his Attorney, and against the Town-clerk of Guilford.

Goods were
replevied
which were
distrained up-
on a convic-
tion for keep-
ing dogs and
nets, not being
qualified.

* P. 209.
Stra. 567.
S. P. resolved
contrary in
2 Stra. 1184.
See Barnard.
K. B. 110.

* Vide ante
96.

ONE *Burchet* was convicted by a justice of peace for keeping dogs, nets, and ferrets, to catch conies, not being qualified, &c. and by a warrant from the said justice, * his goods were distrained for the forfeiture; and whilst they were in the possession of the constable, and before they were sold, the town-clerk granted a replevin to take them from the constable.

And now it was moved to set the said replevin aside, because goods thus taken by distress on such convictions are irrepleviable, and for an attachment against town-clerk.

The court would not set aside the replevin, but made a rule to shew cause why an * attachment should not go; which was afterwards discharged by *Eyre* then alone upon the bench.

D E

Term. Sanct. Hill.

Anno 10 Georgii, 1724.

The King *versus* The Mayor of Kingston upon Hull.

UPON a motion last term, a rule was made, that a *mandamus* should go to the *Mayor of Kingston*, to assemble and keep courts, and to do the office of that corporation; and in drawing up the writ, the clerk added these words, (*viz.*) *And to admit all those to their freedom who have a right to be free of that corporation.*

Several persons cannot be joined in one *mandamus*.
Stra. 578.

And now it was moved to set aside this rule, because all who have a right to be free cannot be joined in one *mandamus*, as it was resolved in the case of the nine common council-men of *Chester*, anno 6 Will. 3. because every one hath a separate right; therefore two, or more, could not be * joined in this writ; for where several are joined, there can be no traverse taken, because no one is party to it.

* P. 210.

The court was of opinion, that the *mandamus* was ill, and not warranted by the rule of the court; therefore if it had been returned, it should have been quashed; but being not returned, it shall be superseded, that the Mayor may not be obliged to make a return.

Curia.

The King *versus* The Mayor of Whitchurch & al'.

A Rule was made against the *Mayor* and other officers of the borough of *Whitchurch*, to shew cause why an information should not go against them, being chosen into their respective offices, and not dwelling in the said borough; and by a jury of *non-residents* being impanelled for that purpose, against which choice the inhabitants of this borough protested, it being contrary to their ancient usage, as was now suggested.

Trial at bar denied.

The

Term. S. Hill. 10 Georgii, 1724.

The counsel for the defendants shewed for cause against this rule, that all the officers of this borough are to be constantly chosen by freeholders thereof; and that some of the inhabitants who were freeholders, were summoned to be of the jury, but they refused to appear, pretending they would not serve with those who were not inhabitants of the borough, but out-dwellers, and therefore excluded from being of the jury; and thereupon others were returned who would serve.

That ever since the year 1641, the *out-dwellers* who had freeholds in the *borough*, were returned jurymen, which appeared by the entries made in their borough-books, and such out-dwellers had served in all the offices thereof.

That *Whitchurch* is an antient *borough* by *prescription*, and that the jury thus impanelled, as aforesaid, did not serve in a court-leet, but in a borough-court; for if it had been to serve in a leet, then it must be by inhabitants, but that in a borough-court none but freeholders are to be of the jury, which freeholders might be out-dwellers, so as they had a freehold within the borough.

That all the jury had freeholds in the borough, and by such a jury assembled at a borough-court, the defendants were lawfully chosen.

Curia.

* P. 211. But the rule was made absolute by two Judges against one, there being but three in court; for this being a matter of right, it was fit to be tried by a jury who are the * proper judges of evidence; and upon another day the court was moved for a trial at bar upon some *affidavits*, that the freehold to the value of 1000 *l.* might come in question, but it was denied for no other reason, but that it was a borough cause.

The Company of Musicians in London, }
or } *versus* Green.
The Chamberlain of London, }

Debt upon a by-law for exercising a trade, &c. the defendant being a musician, which is a science.

A By-law was made in *London*, that no person but a freeman of that city should exercise *any trade or art* therein under such a penalty. Mr. *Green* not being free of the city of *London* played as musician at several city entertainments, particularly at the feast of the sons of the clergy, for which he was sued in the sheriff's court in *London*, for using the trade of a musician, not being free of the city; which cause being removed into this court by *hab. corp.* it was insisted for him, that he was a *musician*, and attended with other masters in musick at the feast of clergymens sons, being employed by the stewards of the said feast; and because they did not likewise employ the city musicians, therefore they set up this prosecution against the defendant, and would now extend this by-law

to

Term. S. Hill. 10 Georgii, 1723.

to musick, which is a science, and no trade; and if this should be allowed, they may extend it to lawyers who are not freemen, and who attend the courts there, for the law is a science, and so is musick: besides it is improper to have the by-laws of London tried in any of the courts of London.—The arguing of a lawyer is *wind-musick*, and no handicraft trade. Curia.

It was argued for the plaintiff, that a *procedendo* should be granted, for that the commitment was good, and so was the by-law; and that this court cannot try whether the case of the defendant *Green* is within this by-law or not, because it is triable only in London where the plaintiff must declare in a proper court, and on a special custom to make by-laws, for otherwise all such laws might be controverted in this court.

On the other side the counsel for the defendant said, that the plaintiff's counsel had *touched very lightly upon the string*; for that the profession of musick was not within this by-law which extended only to handicraft trades; and that musick was not a trade, but a science, in which science degrees were taken in all the universities in Europe. Econtra.

"Cur. Let there be a consultation, it being not proper to determine this question upon motion. The customs of London are always tried in their own courts: but if the Judge refuses (upon request) to let the fact be stated specially, we'll set aside the verdict;" * and therefore a *procedendo* was granted, but with this * P. 212. direction, that the plaintiff should admit the matter to be found specially at the trial, otherwise the court would not grant another *procedendo* in the like case. Curia.

Afterwards the cause was tried in London, and at the trial a difference was taken between exercising such handicrafts for lucre and gain (which was the defendant's case) and exercising them for diversion and amusement, and that the one was within the by-law, and the other not; and thereupon the plaintiff had a verdict and judgment, and afterwards the defendant took up his freedom, and acquiesced.

Morfe versus Sury.

IN an action of debt upon a bond for performance of an award where the submission was of all actions, &c. between the plaintiff and defendant; upon *nullum arbitrium* pleaded, the plaintiff replied, and set forth the award made by the arbitrators on such a day of all actions between the plaintiff and the defendant and his wife, wherein they awarded, that the defendant and his wife should pay 20 l. to the plaintiff on such a day, in full satisfaction of all law-charges due to him by the defendant's wife as executrix of one Bodily her first husband; and that both the plaintiff and the defendant

Term. S. Hill. 10 Georgii, 1723.

should equally pay to the arbitrators the charges of making the award, and that they should execute mutual releases; and the breach assigned was, that the defendant had not paid the 20 l. on the day.

“ *Reeve* for the defendant excepted to the award; for that the submission being only of all differences between the plaintiff and defendant, the award that the defendant and his wife shall pay so much money to the plaintiff is ill, because no difference in which the wife is party is submitted to the arbitrators. *Roll. Abr.* 246.

“ *pl.* 4.

“ If *A.* and *B.* submit to the arbitrament of *J. S.* of all suits and actions pending between them, the arbitrators cannot make an award of an action which *B.* and his wife have against *A.* for that is out of the submission.

10 Mod. 204.

Gilb. Cas. 125.

“ *Hil.* 12 Ann. *Barnardiston v. Fowler.* An award that all prosecutions should cease in all actions between *A.* and *B.* will not extend to suits where *A.* is plaintiff against *B.* and others defendants.

2dly. The arbitrators have awarded money to be paid to themselves, which is illegal.

Econtra.

* P. 213.

“ *Sir Clement Wearg* Solicitor General, *contra.* 1st, The case in *Roll's Abridgment* differs from this case; because there the wife had a demand of which she would have been barred without being made a party to the submission. There is a case in *Cro. Jac.* 447. in point, where a submission was of all demands betwixt plaintiff and defendant, and award that defendant pay, whereas it was a debt from defendant's wife as executrix, and yet held good.

“ 2dly. That part is void, but yet the rest is good. *Cur.* of the same opinion; wherefore judgment for the plaintiff.

Parr versus Niblett.

See antea *Parr*

v. Purbeck

S. C.

Writ of in-

quiry set aside

for too little

damages.

AFTER a writ of inquiry was executed, it was set aside, because the jury gave too little damages; and a rule was made, that on payment of costs, a new writ of inquiry might be executed, which was done, but without paying the costs.

Therefore it was now moved, that this last writ of inquiry might likewise be set aside, and a rule being made for that purpose, unless cause shewed on such a day why it should not, it was now shewed for cause, that the plaintiff had done all in his power to get the costs taxed, but could not prevail; and that the defendant's attorney promised him, that he would take notice of executing this writ of inquiry, as if the costs had been already paid; therefore it was now insisted, that upon payment of costs, the rule might be discharged.

It

Term. S. Hill. 10 Georgii, 1723.

It was said on the other side, that this second writ of inquiry was ^{Econtra.} to be executed *upon payment of costs*, and not otherwise, and that the costs not being paid, that writ could not be executed.

The court ordered the attornies on both sides to attend the master ^{Curia.} of the office, and that the plaintiff should pay what costs the master should tax, and that upon payment thereof, the rule for setting aside the writ of inquiry should be discharged.

* The King *versus* Mary Johnson.

* P. 214.

UPON a motion for an *babeas corpus* to be directed to the defendant, to bring up the body of a child about ten years old into this court, which she (the defendant) unjustly kept from the guardian. ^{Upon an habeas corpus a child was delivered to the proper guardian.}

The case was, (*viz.*) This child remained under the care of Mrs. — an old acquaintance of the family, who had bred the child for some years past; that her father died about six months past, and left the charge of this child to his own brother, J. Howland, the *present guardian*, and now to him, who is intitled to the estate, if the child should die without issue; so that he is not a proper person to be guardian. ^{2 Ld. Raym. 1334. Stra. 599.}

Besides, an *babeas corpus* is a writ for no other use but to set persons at liberty, and there is no reason why it should be granted in this case, because the rightful guardian hath a proper action to recover the child. It is true, the court *ex debito justitiæ* is to grant it, but the merits of the cause shall not be tried upon it.

The court doubted whether they could grant it or not, it being ^{Curia.} the business of the court of *Chancery* to restore children to their proper guardians; and this is not the first time, that upon a return of an *babeas corpus*, persons have been delivered by this court to them who have a right to receive them; it was done by the *Lord Chief Justice Holt*, and in the *Lady Hariot Berkley's* case, upon the return of an *babeas corpus*, it being suggested, that she was married; in the *Lady Rawlinson's* † case, who was detained by her husband † ^{Ante 22.} against her will; both ladies the court left to their own election, because they were both of discretion.

And likewise in that case where the *Lord Anglesea* devised his estate to his daughter, and appointed who should be her guardian, and expressly declared in his will, that if she lived with her mother, half her estate should be forfeited; yet this court would not relieve: but she being brought up by *babeas corpus*, was left to her own choice, whether she would live with her mother, though by her living with her she was to forfeit half her estate.

* But in the principal case the court would make no rule, because the guardian was not in court: but on another day he came ^{* P. 215.} into court, and then the child was delivered to him without farther argument,

argument, though the child cried, not to be delivered to her uncle: for the court resolved that he must take her if he demands her; and *ordered him so to do*, and he *did* take her away out of court, with his own hands. See *Ann Catley's case*, (*Rex v. Sir Francis Blake Deleval, Knight of the Bath, East. term 1763.*)

Plunkett *versus* Gillmore.

Special action
on the case for
representing a
tavern to be a
bawdy house.
Fortesc. Rep.
211.

THIS was a special action on the case brought by the plaintiff in *Ireland*; the declaration was, that he (the plaintiff) kept a tavern in *Dublin*, and that the defendant procured a foldier to dress himself in woman's clothes, and so to personate a woman, and then to come with another soldier to the house of the plaintiff, and to call for wine, and soon afterwards he (the defendant) procured another soldier to come into the room where the two were drinking, and to claim that soldier in woman's clothes to be his wife, and by this means to quarrel with the other, and to cry up the tavern to be a bawdy-house, which brought the mob together, who were likely to break his (the plaintiff's) windows, and that there is a custom in *Dublin* to cart bawds.

Upon the general issue pleaded, the plaintiff had a verdict and judgment in the King's Bench court in *Ireland*; and upon a writ of error brought in this court, it was said by his counsel, that it did not appear by the plaintiff's declaration, that he had any cause of action, for he only set forth, that the *mob were likely to break his windows*, which is no positive allegation, that they did break them, and therefore the judgment ought to be reversed.

Curia.

But the court, without any farther argument, affirmed the judgment, for the declaration set forth a *custom in Dublin for bawds to be carted*, therefore to represent a tavern to be a bawdy-house, may be injurious to his trade as a vintner, by which he may be very much damaged, and by consequence hath a good cause of action.

The King *versus* The Corporation of Penryn in Cornwall.

Information
in nature of a
quo warranto.

* P. 216.

UPON a motion for two informations in nature of a *quo warranto* against two persons who pretended to be mayors of this corporation; and upon an *affidavit*, that * the mayor in possession was not duly elected by a majority of the capital burgesses, there were two rules made, that such informations should go against those two persons; unless each of them should shew some good cause to the contrary; which rules were afterwards made absolute against both the said persons.

And

Term. S. Hill. 10 Georgii, 1723.

And upon another motion for the like informations against two other persons, who pretended to be capital burgessees of the said corporation, but were not, for that one of them had not taken the oaths to the government, and the other was amoved from his office above two years last past, and yet both of them voted at the election of the mayor in possession, by whose votes he had a majority; and the counsel insisting that these two last informations might be first tried, the *Chief Justice* was of opinion not to grant them, because at the trial of the right of the mayor, the not taking the oaths by one of the burgessees, and the amotion of the other, might be given in evidence.

But the counsel still insisting, that there might be an inconvenience in this matter, for if the judge who shall try the right of the mayor should be of opinion, that those things could not be given in evidence at such trial, then the jury would certainly find against the right of one of the mayors; and it is probable that though these two persons were not *capital burgessees* when the mayor was elected, for the reasons before-mentioned, yet they might have done some corporate acts as such, and so might be accounted *capital burgessees de facto*, and therefore their right as such may not be admitted to be litigated at the trial of the right of the mayor.

And of this opinion were the other Judges, (*viz.*) That at the Curia trial of the elected, the right of the electors should not be inquired into or given in evidence; and therefore the most proper method was first to try the right of the electors upon an information in nature of a *quo warranto*, which ought to go against those two persons who pretended to be *capital burgessees*; and thereupon it was granted to try their right first.

* Biggs versus Greenfield and Benger.

* P. 217.

* This was in

Mich. term

11 Geo. ac-

cording to Lord Raymond and Sir John Strange.

" **T**RESPASS against two defendants, for *vi & armis* breaking and entring the plaintiff's house, and taking away and selling his goods, and for breaking and entring his close, taking his cattle, &c. converting them to their own use.

" *Benger* one of the defendants suffered judgment to go by default, and the other defendant *Greenfield* pleaded as to the *vi & armis non culp.* and, as to the other trespasss, justified the entry and taking the cattle by distress for rent due and in arrear to *Benger*, reserved upon a lease made by him to the now plaintiff, by command from *Benger*, by licence of the plaintiff; and that he, the defendant *Greenfield*, sold the cattle which he had distrained for the rent, by the leave of the plaintiff himself, from whom the rent was due.

Trespass against two for breaking and entering the plaintiff's house, and taking away and selling his goods.
2 Ld. Raym. 1372.
Str. 610.

" The plaintiff took issue upon his *licence to sell*, and the jury
 " found for the defendant, (*viz.*) That he had leave to sell the
 " cattle.

" Now *Webb* serjeant moved in arrest of judgment for *Benger* ;
 " for that the verdict having found the issue on the licence for the
 " other defendant, it appears upon the record that the plaintiff has
 " no cause of action, and consequently he can have no judgment
 " against any defendant. *Lev.* 63. Covenant against two for not
 " building an house ; judgment against one by default, and the
 " other pleaded performance, and found for him ; on which judg-
 " ment was arrested, because it appears that there is no cause of ac-
 " tion. *Cro. Jac.* 134. Trespass against two for taking a gun ; one
 " justifies the taking for preservation of the peace, and found for
 " him ; the other pleaded Not guilty, and found for the plaintiff ;
 " and he had judgment, for the taking shall be intended at another
 " time without cause : otherwise where one defendant justifies by
 " gift of the goods ; for that shews the plaintiff can have no cause
 " of action. *8 Co.* 120. *b.* *3 Co.* 52. *b.* *7 Ed.* 4. *pl.* 18. If several
 " commit a trespass, the same is joint or several at the will of him
 " to whom the wrong is done : yet if he release to one of them,
 " all are discharged. *Co. Litt.* 282. *a.* It must appear upon the
 " record that the plaintiff has cause of action ; and it will not be
 " sufficient to say that it does not appear that he has no cause of
 " action. The licence is the same as a release or grant, for it
 " equally destroys all cause of action.

* P. 218. Besides, this plea is ill for another reason, (*viz.*) Because it is
 not averred, that the lease upon which this rent * was reserved, and
 for which the distress was taken, is still subsisting, and not expired ;
 for if it is, then the distress was unlawful.

Econtra.

On the other side it was argued, that this justification was entire,
 and went to the whole trespass, for the entring and taking the cattle
 is justified by a distress for rent, which part of the plea was ad-
 mitted on all sides to be good, and the conversion was answered by
 the licence which the jury had found ; so that upon this record it
 doth not appear, that the plaintiff had any cause of action, there-
 fore the defendant must have judgment.

It is true, the other side would distinguish this case from an ac-
 tion of *debt or covenant* ; but yet where on the record itself it ap-
 pears that the plaintiff in trespass had no cause of action, it is the
 same thing ; and though it should be admitted, that this plea doth
 not cover the whole action, yet the jury having given entire da-
 mages for the conversion as well as for the entry, the plaintiff can
 never have judgment on this record.

" *Cur.* This case of a licence cannot be distinguished from a
 " gift of goods or release, which destroys the cause of action as to
 " all the defendants, wherefore let judgment be arrested as to both.

Small *versus* Mordant ;

or

Mordant *versus* Small.

ERROR of a judgment given in the court of Common Pleas in an action of *covenant* brought by the plaintiff on a deed-poll, in which action the plaintiff declared that in and by the said deed, the defendant covenanted to pay 15000*l.* on the plaintiff's transferring 200*l.* *South-sea* stock to the defendant, or other person, at the request of the defendant on or before the 28th day of *September*, and at such a place, at which time and place the defendant covenanted to receive the stock ; then he (the plaintiff) sets forth the custom of that company to transfer the stock at the *South-sea house*, in such a method and at such hours, and avers, that he (the plaintiff) was at the *South-sea house*, &c. on the 28th day of *September*, & *parat. fuit & obtulit* then and there to transfer the stock, and *stayed there from nine of the clock in the morning of that day, until three of the clock in the afternoon*, and till the books were shut ; and that the manner of transferring is by signing the name in the books of the company, &c. but that the defendant, or any other person for him, was not there to receive or accept the said stock, and to pay the money *ad damnum*, &c.

And upon a demurrer to this declaration, judgment was given in
* C. B. for the plaintiff.

* P. 219.

“ And now *Leigh* for plaintiff in error argued that the declaration was insufficient.

“ 1st. The tender is ill, for it is not *shewed which were the usual hours* for transferring ; so that it does not appear that the tender was made within the usual hours of transferring. *Colebourn vers. Davies*. There a tender was pleaded to be made *secundum usuales regulas & ordinationes in hujusmodi casu edit. & provis.* which the court inclined to be ill, so that the plaintiff discontinued.

“ 2dly. The tender ought to have been made the last instant of the time.

“ 3dly. The plaintiff ought to have signed the transfer books ; a *parat. fuit & obtulit* is not sufficient.

“ 4thly. By the contract the defendant is left at liberty whether he will take the stock or not ; for without his request he cannot be obliged to acceptance ; and it not being averred that he made a request, no action lies.

“ *Reeve contra*. 1st. The plaintiff was at the *South-sea house* to the shutting of the books ; so that the particular hours for transferring were immaterial.

“ 2dly. If the plaintiff was there the whole time, he must have been there the last instant of the time

“ 3dly.

Term. S. Hill. 10 Georgii, 1723.

“ 3dly. Signing the transfer is making an actual transfer, which
“ is unnecessary where the defendant does not appear. won bnA
“ 4thly. Such construction will overthrow the whole contract:
“ On the request of the defendant, being words repugnant, ought
“ to be rejected.
“ Pratt Ch. Just. Suppose the plaintiff made a tender at ten of
“ the clock, then went away, and in the mean time the defendant
“ came expecting the transfer, would that be a good tender? No
“ certainly: therefore the plaintiff ought to have pleaded a tender
“ the last instant when the defendant was bound to attend in order
“ for an acceptance.
“ Fortescue Just. 1st. It ought to appear the custom and usage to
“ be to transfer between the hours of nine and three. Such pre-
“ ciseness is not requisite in case of a common law tender, because
“ every person is acquainted with the common law: but the case
“ is different where a tender is to be regulated by the usage and
“ customs of a private corporation. I think it ought to have been
“ averred what were the usual hours of transferring. This was one
“ of the points adjudged in the case of *Lancashire and Killingworth*.
“ 2dly. The tender is alledged to be made on the 28th of *Septem-*
“ *ber*; so it may be concluded not to be made within the proper
“ hours for transferring. 3dly. There is no necessity to fill up the
“ transfer: so resolved in the case of *Blackwell vers. Nash*, (*ante*
“ 105.) such transfer would be idle, if the party did not come to
“ accept it; case of a covenant to execute a deed, the party must
“ prepare the deed, get it ingrossed and sealed; but need not exe-
“ cute it, unless the covenantee be ready to accept it. 4thly. By
“ the words of this contract the first act lies on the defendant, viz.
“ to request the transfer.
“ Raymond Just. It is a foolish agreement leaving the defendant
“ at liberty to proceed in the bargain or not; agreements are to be
“ guided by the words, the tender not being made at the last instant
“ seems ill. *Adjournatur.*

* P. 220.

* *Pocklington versus Hatton.*

SIR *Thomas Hatton*, the testator, made a will in favour of the
defendant, and afterwards purchased more lands, and then he
made a codicil, and disposed some part of his personal estate, but
did not mention the purchased lands.

After the death of the testator, his heir at law, who was the
lessor of the plaintiff, brought an ejectment, and the Judge who
tried the cause being of opinion for the plaintiff, the counsel for the
defendant tendered a bill of exceptions, which, as drawn up, and
signed by the counsel on both sides, the Judge refused to seal; and
thereupon the jury, by his directions, found a general verdict for
the plaintiff.

And

Term. S. Hill. 10 Georgii, 1723.

And now, upon an affidavit made of this matter, the court was moved, that all the proceedings might be set aside, and that the plaintiff (if he thought fit) might bring a new ejectment, or at least, that the court would stay all farther proceedings in the cause, till the bill of exceptions was signed by the Judge.

It was insisted for the plaintiff, that the judgment was signed, *Econtra.* and the record removed by the defendant, who had brought a writ of error in the Exchequer-chamber, so that the court could not make any rule in this cause, and that the defendant made this motion for no other purpose, than that the court would allow him time to assign errors, because the Judge had refused to sign the bill of exceptions; but since the plaintiff had a verdict and judgment, and the defendant was in possession, it was proposed that he should deliver up the possession to the plaintiff; and then, if the defendant thought himself wronged, he might be plaintiff in a new ejectment to recover the possession again.

It was objected against this proposal, that if the now defendant should deliver up the possession, and be made plaintiff in a new ejectment, there were several old terms still subsisting which might stand in his way, and that the writ of error in the Exchequer-chamber was not yet returned, so that this cause was still under the control of this court.

The court was of opinion to grant a new trial, if the defendant *Curia.* had made this motion in time, (*viz.*) Before * the judgment was signed, but not after, and much less after a writ of error brought in * P. 221. the Exchequer-chamber.

And as to the staying the proceedings till the Judge who tried the cause should sign a bill of exception, that may be for ever, because he may never sign them; for (*per Pratt Ch. J.*) it hath been resolved in this court, in my Lord Chief Justice Holt's time, that a Judge is not obliged to sign a bill of exceptions, unless offered at the trial, and drawn up according to the minutes then taken.

The defendant's counsel perceiving the opinion of the court, offered to deliver up the possession to the plaintiff, so as he would enter into a rule of court not to set up any old terms for years, or incumbrances against the defendant's title, and that he would receive a declaration in ejectment immediately, and plead to issue, so as a trial might be made at the next assises; and if a verdict should be found against him, then to quit the possession within ten days after the trial; to all which the now plaintiff agreed.

And at the next assises this ejectment was tried, and the jury found a verdict for the defendant, who was heir at law, and that to the satisfaction of the Judge who tried the cause; and in *Easter term* following the plaintiff moved for a new trial, and to set aside the last verdict, because the jury found a general verdict, when it was required that they would find the matter specially; and accordingly it was set aside.

And in *Trinity term* the court was moved for a good jury, and that a special verdict might be found, which the court thought necessary to determine the law in this matter; and a rule was made for a good jury.

Wright *versus* Horne. In the Common Pleas.

See the case
of Goodright
and Opie,
antea 123.
Förtesc. Rep.
182.

THE case, *ff.* The testator devised all that his messuage in Edmonton to Francis Carter and his heirs, and all the rest and residue of his messuages, lands, tenements and hereditaments in Edmonton, Enfield, and elsewhere, to John Lammas, his heirs and assigns for ever.

After the making this will, the aforesaid Francis Carter, the devisee, died in the life-time of the testator, so that this became a lapsed legacy by his death; and then the sole question in ejectment was, * P. 222. Whether this latter clause of * the will would carry over the lapsed legacy to John Lammas, the residuary legatee, or whether it should descend to the heir at law of the testator.

It was admitted, that such a residuary clause would carry over a lapsed legacy to a residuary legatee from an executor; but the doubt was, Whether it would carry it from the heir at law.

* Lane 57.
By Raymond
J. T. Raym.
453.
Ch. Pre. 384.
By Trevor Ch. J.

Those who argued that it would not, cited many authorities in the books, where it is expressly adjudged, that an heir at law shall not be disinherited, but by very plain and * clear words, or by some necessary implication from express words, which shew that the testator did intend to disinherit him.

T. Jo. 107, 114. Cro. Car. 158. 369. 447. pl. 10. Cro. El. 742. pl. Dy. 371. pl. 1.
J. 12 Mod. 596, 597. By Cowper K. 2 Vern. 371. pl. 517.

† Show. Parl.
Cal. 87.
2 Vern. 371.

Now, in construction of wills, the courts of law always consider the intention of the testator, which they collect out of his words; as for instance, in the case of † Cranmer and Webb, upon the will of Sir Henry Wood, who devised, that if his daughter married the Duke of, &c. then his lands should be and remain to her and the heirs of her body; but if she died without issue, then, after her death and the death of the Duke, that they should be and remain to Sir Caesar Cranmer, &c. She died without issue, and the Duke survived, and Sir Caesar and Mr. Webb married her sisters: adjudged, that they should take by moieties during the Duke's life.

Fitz. Devise
22.

So where a man devised his estate to his eldest son, and to three more and their heirs, and that one of those three should have all the profits during life; and it being proved that the devise was only in trust for those three, it was adjudged, that they should release to the son, who was heir at law.

Term. S. Hill 10 Georgii, 1723.

So in *Chancey's* case in *February* last, where the testator, after a devise of several *pecuniary legacies*, added these words, (*viz.*) And all the rest of my goods and chattels, and estate whatsoever, I devise to my wife, &c. It was decreed, that the equity of redemption of a copyhold of inheritance (of him the testator) did not pass by that clause to the wife, but it should go to the heir at law.

Between
Wells and
Edwards.

And so it was where the testator devised lands held of such a manor to his wife for life, and likewise the services to her for fifteen years, and all the manor to T. S. after the death of the wife: It was adjudged, that the heir at law had a good title to the services after the fifteen years, and during the life of the wife.

Moor 7.
Roll. Abr.

* There is a case in *Leonard*, where there seems to be a contrary resolution against the heir at law, but upon consideration thereof it will appear to be very different from the principal case, (*viz.*) It was a devise of lands in *Gages*, for the erecting and maintaining a free-school, and a devise of other lands to T. S. and his heirs, and all his other lands to T. French, his heirs and assigns for ever; in this case it was adjudged, that the devise of the lands in *Gages* was void, because there was no person to take by that devise, but that it passed to French by those general words, (*viz.*) All other his lands to French, though the intention of the testator could not be collected out of the words of this will, that they should pass to him.

844.
* P. 223.

1 Leon. 251.
Bennett v.
French.

Besides, this case stands singly by itself, and there is not another in all the books to support it; and upon due consideration had, there is some difference between that and the principal case; for in French's case, the devise was void *ab initio*, but here it was good at the time of the making this will, and the testator himself, without a prophetick spirit, could not know but that it would be good at the time of his death.

If it should be objected, that these lands may pass to *Lammas* by way of executory devise, upon the contingency that *Carter* might die in the life-time of the testator, which he might very well intend, without a prophetick spirit; the answer is, that for estates to pass by executory devise, is only an indulgence allowed by the law, where otherwise the words of the will would be void, which is not applicable to the present case; because there are other lands mentioned in this will, sufficient to satisfy the words.

Neither are these cases (where it appears on the face of the will, that the testator had lands to dispose at the time the will was made) applicable to this case, because here the testator had not these lands to dispose at the time of making his will; for the words, (*viz.*) All the rest and residue of his lands to John Lammas, are exclusive, and shall only pass those lands which were not before devised; but the lands now in question were before devised to *Carter*; and he being dead in the life-time of the testator, it is impossible for him to take by this devise, therefore they shall descend to the heir at law.

Allen 28.
2 Vent. 285.
1 Lev.
Salk. 239.
pl. 18.

It

Term. S. Hill. 10 Georgii, 1723.

Econtra a-
gainst the
heir.

* P. 224.

It was argued for *John Lammas*, the residuary legatee, that by the devise of *all the rest and residue of his lands* to him and his heirs, those very lands which were devised * to *Carter*, and which by his death in the life-time of the testator became a lapsed legacy, were legally vested in the said *Lammas*; so it seems plain, that all the rest and residue of his estate, which the testator had at the time of making his will, did pass to him by those words; and why should not that estate, which by possibility he might have in his life-time, pass to the said *Lammas* by way of executory devise, upon a contingency that *Carter* might die (as he did) in the life-time of the testator, especially since by the devise to *Carter*, the heir at law was disinherited.

It is like that case, where the testator devised his lands to two and their heirs, and one of them afterwards died, living the said testator, the other shall have the whole, though by the words of the will the testator intended him only a moiety, but he shall have the other moiety before the heir at law, because it is very plain the testator intended to pass all his estate from him.

Cro. Eliz.
423.

So where the devise was to *T. S.* and his heirs, and if *he died without issue*, then to *M. H.* in fee, and afterwards *T. S. died in the life-time of the testator, but left issue*: adjudged, this was a lapsed legacy as to *T. S.* and that the lands should pass to *M. H.* and not to the issue of *T. S.* because such issue could not take by this devise.

Now in the principal case, the testator intended that *Lammas* should take what he had not before devised to *Carter*; and his intention is clear without any spirit of prophecy, that if *Carter* had lived, the heir at law had been effectually disinherited; therefore these general words, (*viz.*) *All the rest and residue of my lands to Lammas*, being sufficient to pass them to him, and agreeable to the intention of the testator himself, they must necessarily pass to him.

As to that case between *Wells* and *Edwards*, it is no authority against that construction which hath been made in the principal case, because in that case the will began with pecuniary legacies, which shews that the testator did not intend to pass the equity of redemption of a mortgage of a copyhold of inheritance to his wife, and for that reason it went to the heir at law.

Curia.

* P. 225.

The court were of different opinions, there being no case in all the books which comes near it, except that in *Leonard's Reports*, which ought to be well considered; but the Chief Justice was of opinion for the heir at law against the residuary legatee; because these words, (*viz.*) * *All the rest and residue of my lands to John Lammas*, were exclusive of the lands devised to *Carter*; so that by his death in the life-time of the testator, the legacy to him being lapsed, those lands must descend to the heir at law.

Another Judge was of a contrary opinion, (*viz.*) That it seemed very clear to him, that the testator intended to disinherit the heir; to which opinion the Chief Justice likewise agreed as to the lands devised

devised to Carter; but that it doth not follow, that because he had disinherited him of the lands in relation to Carter, therefore he intended to disinherit him of those lands which he had devised to Lammas; so that this matter is fit to be considered; and so it was adjourned.

But according to Horley's report the court at length gave judgment for the heir. See a like decision cited in 2. Blackst. R. 736.

Anonymus.

AN execution was taken out against the testator, in his life-time, and executed after his decease; the writ was returnable octab. Martini, and executed on the 16th day of November, which was two days before the return was out.

It was objected, that this execution was ill, being executed after the testator's death, and without any *scire facias* brought, to shew cause *quare executionem non habet*.

The execution being sued out before the testator's death may be Curia. executed afterwards without a *scire facias*, as was resolved in Dr. Needham's case; and it may be executed at any time before the return of the writ, nay, on the very day that it is returnable, and good; and if it is executed in the vacation, it shall refer to the antecedent term, and so it shall, if it is executed in term-time; so is *Vent. 218. Gro. Eliz. 181. pl. 16.*

Crundell versus Bodily.

IN ejectment the defendant had a verdict and judgment, and costs *Str. 554.* taxed, and then the plaintiff brought a writ of error on the Exchequer-chamber, and pending that writ he brought a new ejectment; and now it was moved, that he might not proceed on this *Salk. 259.* ejectment till he had paid the costs of the first.

* It was insisted for the plaintiff, that he did not bring this writ of *Econtra.* error to avoid the payment of the costs, neither was the verdict and * *P. 226.* judgment against him in the first ejectment any bar to his bringing another ejectment; it is true, it may be evidence against him, but it is no bar, therefore this motion comes too soon, and ought to be suspended till the errors assigned are determined in the Exchequer-chamber, and the judgment either affirmed or reversed.

The court thought it hard that the defendant should be doubly vexed by the proceedings on the writ of error, and by a new ejectment; therefore made a rule, if the plaintiff should proceed on the ejectment, he shall pay the costs of the first, otherwise he shall not proceed on the second.

hold the defendant to special bail, where nothing was due, as it appeared before a judge, the plaintiff being summoned before him to show his cause of action, and consequently a contempt.

The King versus Colvin.

UPON a motion for an attachment against the defendant, who is a gaoler, for denying to return an *habeas corpus* directed to him, and for extorting a note from the prosecutor, then in his (the gaoler's) custody, so as by menaces and dures he was forced to comply, and give the note for payment of money to the gaoler.

The court made a rule, that he should shew cause why an attachment should not go.

Nota; An attachment issued out against an associate for mending a record after a motion in arrest of judgment for the same fault, which he mended; but upon his making the record as it was before, it was mended, and paying costs, the court, *ex gressu*, superseded the attachment.

Stra. 575.

A motion was made to set aside two verdicts, because the *stringas* were not stamped, so that the trials were void by the stamp-act; but the solicitor having got those writs stamped before the *poslea* was brought into court, this motion was rejected, for it did not appear to them but that they were stamped; and they could not take any notice, whether they were stamped, or not, at the assises; if they were not, the defendant should have taken notice, and insisted on it at that time.

Nota; It was held by the court, that it is not sufficient to deliver a copy of a declaration to the turnkey or gaoler, where the defendant is in custody, unless the declaration is first filed in the office; and therefore where a judgment was had upon a declaration so delivered, it was set aside by the court.

And if judgment is regularly obtained against such defendant, the plaintiff must charge him in execution within two terms afterwards, and not after those two terms are expired, or if he is charged afterwards, the court will discharge him with costs.

The King versus Pepper.

A Rule of this court was made, anno 15 Car. 2, that the plaintiff should set forth in his writ or bill an *ac etiam* of the sum for which he expected the defendant should give bail; and that if he brought an action without any cause, on purpose to hold the defendant to special bail, he should be punished.

And now the court was moved for an attachment against Pepper, who brought an action, with an *ac etiam billa* in a great sum, to hold

Term. S. Hill 10 Georgii, 1723.

hold the defendant to special bail, where nothing was due, as it appeared before a Judge, the plaintiff being summoned before him to shew his cause of action; and this was said to be an abuse of the process of this court, and consequently a contempt.

The court held this was not such a contempt as to issue out of Curia. grant an attachment against the plaintiff, but directed, that if the defendant was damnified, he might bring his action.

Andrews versus Harper.

IN C. B. there is but one *scire facias* against the bail, and upon *nihil* returned there is execution, but in B. R. the course is to have two *scire facias*'s against the bail, (*viz.*) A *sci. fa.* and an *alias sci. fa.* but both must not be sued out together, as formerly; for the first shall be duly returned before the *alias sci. fa.* is sued out, which must bear teste on the day of the return of the first; and there must be fifteen days inclusive, between the teste of the first and the return of the *alias*; now, in the principal case, the court was moved to set aside a judgment obtained against the bail * * P. 228. upon two *scire facias*'s brought against them, because it did not appear that the judgment was had on the return of two *nibils*; and it was referred to the master to examine this matter.

Wadsworth versus Handyfide.

BY the statute 12 Will. 3. it is enacted, that actions may be brought in any of the courts in Westminster, against any person entitled to privilege of parliament, immediately after the dissolution or prorogation, until a new parliament, or the same is re-assumed, and immediately after an adjournment of both houses, for above fourteen days, until re-assumed; and that persons having cause of action against any member of the house of commons, may have process against him during the time aforesaid, out of the said courts, by summons, by distress infinite, or by original bill, summons, attachment, and distress infinite, till the defendant shall appear and file common bail, &c.

Now this being a proceeding in a special manner directed by this statute against privileged persons, the usual practice is, when an action is brought against such privileged person, to file a bill in nature of a special *capias* against the defendant, and then to summons him; and if he appears upon such summons, then the plaintiff may declare against him as in *custodia mareschalli*; to which declaration he ought to answer without any imparlance; and in the principal case, the defendant having appeared upon the summons, and filed common

12 Will. 3. c. 3.
How to proceed against privileged persons.

Term. S. Hill. 10 Georgii, 1733.

common bail, it was now moved, that he might have no imparlance over to the next term.

Econtra.

It is admitted, that this suit was against a member of parliament, and that if he was not a privileged person, he might have an imparlance of course to the next term, since the declaration against him was not delivered before *Cro. animarum*.

That if a special original is brought against a person who hath no privilege, he must likewise have an imparlance of course; and it would be a very proper method to leave those who had no privilege, and those who were privileged, upon the same footing.

As to the act of parliament mentioned on the other side, it hath no manner of influence on the practice of the court; it only appoints a method to bring privileged persons to appear.

* P. 229.

* But admitting that the plaintiff might proceed in this case, as by special original, yet that would not be a reason against granting an imparlance, because the summons is still general, and so is the *capias*; and it is not the special original, but the special *capias* which hastens the proceedings; and it would be very hard to take this as a case, where a special *capias* is allowed to be the first summons; therefore it was insisted for the defendant, that he might have leave to imparl.

Curia.

The court was of opinion, that the proceedings in this case should be like those in most other cases, and not to be influenced by the state of either party; and that if they are founded on a special original, then there lies an imparlance of course till the next term.

Long versus Nixon.

THIS was an action brought in London, and the defendant moved the court to change the *venue*; and a rule was made that it should be changed.

And now the plaintiff moved to discharge that rule, and it was insisted in his behalf, that this was a transitory action, which the plaintiff might bring where he pleased; and that it was by the indulgence of the court, and for the ease of the parties, that *venues* are at any time changed, and that it would be very inconvenient for the plaintiff if this *venue* should be changed, because the action being brought by special original, there would be a variance upon changing the *venue*, therefore it is convenient for the plaintiff, that the action should be tried in London.

Econtra.

It was said for the defendant, that though it might be convenient for the plaintiff, yet it might be otherwise for the defendant to have this trial in London, and that there could be no inconvenience to the plaintiff, though the action was brought by special original, for such actions are frequently brought in the court of Common Pleas, and there the *venues* are daily changed.

The

Term. S. Hill. 10 Georgii, 1723.

The court would not discharge the rule for the changing the ^{Curia.} venue, for if they should, then where an action is laid in London, the venue would never be changed; and as to the variance, the defendant shall take no advantage of it, though the action was brought by special original.

The King *versus* Burridge the Mayor of Tiverton.

“ *PER* Pratt Ch. Justice. If an affidavit is laid before the court of suspicion that there will not be a fair jury, and the adverse party will not consent to a good jury, we will rule one without his consent. It is done every day in the court of Common Pleas. ^{Rule for a jury without consent.}

* D E

* P. 230.

Term. Paschæ,

Anno 10 Georgii, 1724.

Knight *versus* Cambridge.

Intr. Hil. 10 Geo. Rotulo 375.

W RIT of error to reverse a judgment given for the plaintiff in the Common Pleas in an action brought on a policy of insurance against the perils of the sea, winds, pirates, and * barratry of the master. ^{Action upon a policy of insurance. 2 Ld. Raym. 1349. Str. 581.}

“ The declaration laid for breach that the ship was lost *per fraudem & negligentiam magistri. Non assumptis*, and a case was made at the trial, which shewed the policy of insurance which insured the ship against all losses and misfortunes, and against barratry; and then shewed that the ship was lost by the wilful fraud and direct negligence of the master; and whether such loss is within the policy is the question? ^{* (i. e.) Decept.}

Term. Pasch. 10 Georgii, 1724.

For the de- It was insisted for the defendant, that it was not, for this verdict
fendants: will not warrant this judgment, because *fraud* is not within the
general words of this insurance, which, like other covenants, must
have a reasonable construction; for if a man sells lands, with a co-
venant in the purchase-deed, for quiet enjoyment, without any di-
sturbance, &c. certainly those words must be intended to be against

†Vaugh. 122. a † lawful disturbance.

2 Saund. 180.

Mol. de Jur.

Mar. 282.

f. 12.

Grotius de

Jure Holland.

“ General words may be restrained to a particular signification.
“ 2dly. The breach is assigned too general; for there are several
“ frauds in the master, which the insurers are not obliged to make
“ good.

Now it is plain, that *negligentia* is no barratry, because barratry
is a fraud which doth not include a neglect; and the merchant hath
his remedy against the master for any neglect; so that admitting
there was a neglect in the master, yet if it is not within the policy,
* P. 231. * the insurers cannot be charged; and for these reasons the judg-
ment ought to be reversed.

Econtra.

On the other side it was said, that this policy of insurance was
drawn in as general words as could be invented; and it is very
true, it must be expounded as other covenants, and like the covenant
for quiet enjoyment, though in general words it extends only to a
legal disturbance, and for very good reason, that being the disturb-
ance which is only intended:

But it is otherwise in *policies of insurance* which were intended to
encourage trade, and that merchants might venture more freely, be-
cause if any loss should happen, they might bear it with more ease.

Now *barratry*, in its nature, is any kind of cheating, and the
verdict finds this ship was lost *per fraudem & negligentiam* of the
master; and it is generally known, that ships are never wilfully
sunk, but after some barratry committed, for then they are destroyed
to conceal the villany, so that *fraus & negligentia* is a plain barratry
within the words of this policy.

Therefore since insurances began and are upheld to encourage
merchants to trade, and that the words of this policy are sufficient
to charge the insurers, and there is no default in the merchant; it is
unreasonable that the wilful default of the master should avoid this
insurance; therefore the judgment should be affirmed.

Coria.

Cur. Every neglect of the master is not within this policy; and
if he run away with the ship or imbezel the goods, the merchant
may have an action against him: but yet he may provide against it
in another manner, (*viz.*) By insuring his ship and goods to secure
himself against such acts of barratry; for it is reasonable that mer-
chants who venture a large share of their stocks should secure them-
selves in what manner they think proper against the barratry of the
master, and all other frauds.

Barratry

Term Pasch. 10 Georgii, 1724.

“ Barratry is a word of more extensive signification than only to
“ include the master's running away with the ship: it may well
“ include the loss of the ship by his fraud (a) or negligence. (a) By Raymond J. per
“ 2dly. A breach assigned in the words of the covenant is good, fraudem aut
“ as here, *per barratriam magistri*, had been good: but it is negligentiam
“ equally good to assign the breach in words tantamount. Where would not
“ is the difference between running away with a ship and sinking it? good.
Judgment affirmed.

* Wilkinson *versus* Meyer. Tuesday 28 Apr. * P. 232.

AN action of covenant was brought upon an indenture, wherein the plaintiff covenanted to transfer, and the defendant to accept a transfer of so much *South-sea* stock at any such a time, and to pay so much money for the transfer; and now this action was brought for the money. Covenant to transfer stock. Stra. 585. Ante 173. 2 Ld. Raym. 1350.

The defendant pleaded, that the contract was not registered according to the statute 7 Geo. by which it is enacted, *That every contract for the sale or purchase of subscriptions or stock of the South-sea company, &c. shall be entered in books to be kept for that purpose by the company, to whose capital such stock or subscription did belong, and in default of such entry, every such contract shall be void; and such entries shall express the names of the parties for whose use such contracts were made, &c.* 7 Geo. stat. 2. c. 8.

“ Issue thereon; and at the trial at *nisi prius* a case was agreed to, which was, that the plaintiff made an entry of the contract *verbatim*, and at the bottom thereof used these words, *This is for my proper use and benefit. Philip Wilkinson.*

“ It was further stated, that no evidence was given to prove the contract to be made for the benefit of any other person.

“ And whether this is a good registry according to the directions of the act of 7 Geo. was the question.

Now the plaintiff in registering this contract did not express the names of the parties for whose use it was made, but that it was for his own use; and it was argued in his behalf, (by *Strange*) that this was a good registering the contract within the act, which was made on purpose to prevent doubtful suits, on account of so many persons being made trustees; and though it may be objected, that this registering only shews who hath the benefit of the contract then made, yet it was the intent of the legislature, that contracts to be made at any time after should be registered, on purpose to shew who they were that had a right to the stock; and this is sufficiently shewed by registering it as before-mentioned.

“ It appears by this registry that the plaintiff had both the legal and equitable right. The objection arises only from the difference of the words *were* and *is*. The act requires the entry to
“ express

Term. Pasch. 10 Georgii, 1724.

“ exprefs for whose use fuch contracts were made; and here it is
“ entered this is for my use, *P. W.* But this act is not to be con-
“ ftrued ftrictly to bar perfons of their right. Even in common
“ law conveyances words of a paff and prefent tenfe are ufed pro-
“ mifcuoufly, and do not import a different conftruction: as in
“ gifts, *procreatis* fhall extend to iffues begotten afterwards, and
“ *procreandis* to iffues begotten before. *Co. Lit. 20. b.*

Econtra:

The words of the act being plain, *That the entries, &c. fhall ex-
pref the names of the parties for whose use the contracts were made,*
fuch an entry as in the principal cafe will not be good, for it is not
within the ftatute, that being made to quiet the minds of the people,
and for that reafon fhould * have a favourable conftruction; but the
intent of the ftatute is not answered by this fort of regiftring; for
the entry, that it was *for the plaintiff's own use*, may be in truft for
a *director of the company* at the time of *making the contract*, though
it may be for his own use at the time of *making the entry*; and the
act plainly imports, that the entry fhould fhew for whose use it was
at the time of *making the contract*; for if it was to the use of any
of the *directors*, who by fraud had raifed the value of the *South-fea*
ftock, it would be void, and an action would lie againft him for fo
much money received to the use of him who paid it.

* P. 233.

Now this ftatute being made to difcover the eftates of thofe who
had cheated the people, and to quiet their minds, and to prevent
the frauds of the directors, that they might not for the time to come
have any benefit of fuch contract; it ought to have as liberal a con-
ftruction as the legiflature intended, therefore the entry fhould fhew
for whose use this contract was made.

Econtra.

To which it was answered and admitted, that this ftatute ought
to be carried as far as poffible, to obviate the frauds of the direc-
tors; but there could be no fear in this cafe, that any of them could
be concerned, becaufe this was a contract for *lottery annuities*, which
the directors always fubfcribed in their own names, but not the
money-fubfcriptions.

Curia.

The questions are, Whether this entry hath complied with the
words of the act? If not, then, whether the meaning of the act
was fatisfied or not? And by “ *Pratt Ch. Juft. & Cur.* The act
“ intended that the defendant fhould know what perfon had the
“ equitable, and what perfon had the legal right to demand the
“ money on the contract. The perfon is to regifter firft the name
“ of the perfon interefted and the contract. The act is not to be
“ made use of as a fnare to intangle peoples rights. If it was the
“ plaintiff's contract when he regiftered it, it fhall be intended to
“ have been his when the contract was made. The contract itfelf
“ which is entered *verbatim*, appears to be made to the plaintiff and
“ to be for his own use: and no evidence was given to the con-
“ trary. 3 *Lev. 1.* Judgment for the plaintiff.

But

But judgment being given for the plaintiff, a writ of error was brought in the Exchequer-chamber by the defendant; and in Trinity term following, it was moved to amend * the *venire facias*; * P. 234. for this being an action of covenant, and the defendant having pleaded several pleas, and the plaintiff having replied to one, and demurred to the rest, the *venire facias* was drawn in the usual form, (*viz.*) *Tam ad triandum exitum quam ad inquirendum de damnis*, these last words, (*viz.*) *Ad inquirendum de damnis* ought to be struck out.

Motion to amend a record.

To which it was answered, that if the court should give leave to amend this record after a writ of error brought, it is but reasonable that the plaintiff in the original action should pay costs; for it is probable, that the writ of error was brought by the defendant for this very fault.

Thereupon the counsel for the defendant in error offered to pay costs, so as the plaintiff would waive his writ of error, for then it will appear, that it was brought for this very fault; but if he would not waive it, then it must be brought for delay; but he refusing to waive it, the defendant had leave to amend without paying costs.

Webster versus Gearing.

A Motion was made to quash the proceedings against the bail, the plaintiff having declared for more than was contained under the *ac etiam* in the bill:

To quash the proceedings against the bail.

One Judge replied, that in the case of * *Wiatt versus Evans*, anno 1694, it was adjudged to be a discharge of the bail; and another Judge said, that in the Common Pleas it was held good *pro tanto*; but that there being two causes of this kind now depending, the proceedings were stayed in this cause till the point was resolved in the other.

Curia. 3 Salk. 55. pl. 1.

The King versus Pindar.

UPON an information in the nature of a *quo warranto* against the defendant, for usurping the office of mayor of the corporation of Penryn in Cornwall; the defendant pleaded, that he was *debite electus*, and sworn into the said office, &c. The plaintiff replied, that he was not *electus*, and sworn *modo & forma*, &c. as he had pleaded, and thereupon they were at issue, and the jury found that he was *debite electus*, but that he was not duly sworn into the office, &c. And upon a motion to set aside this * verdict, it was insisted, that he was not mayor till duly sworn, and therefore he had usurped the office, and judgment of *ouster* ought to be given and entered against him.

Information in nature of a *quo warranto* for usurping the office of mayor. See ante 215. Post 332.

* P. 235.

Term. Pasch. 10 Georgii, 1724.

Econtra.

But on the other side it was said, that the election being found to be regular, the defendant was intitled to a *mandamus* to be sworn; but if there is a general judgment of *ouster* against him, in such case he cannot have a *mandamus* to be sworn by virtue of any precedent election; therefore it would be prejudicial that such judgment should be entered against him; and there being no precedents in what manner it should be entered, the court was moved to give some directions therein, so as the entry of the judgment might not hinder the defendant from obtaining a *mandamus*.

"The court bid them enter their judgment according to law.
 "Raymond and Fortescue thought it rightly entered: Reynolds doubt-
 "ed. The court gave judgment of *ouster*, which was afterwards
 "affirmed in *Dom. Procer*."

* See 3 Burn's
 Just. 293.
 edit. 1767.

The Parishioners of Buckingham *versus* The Parishioners of Shepton * Bechamp.

Apprentice
 hired into a
 service after
 his master
 broke.
 2 Ld. Raym.
 1352.
 Stra. 582.
 Fortesc. Rep.
 321.
 Foley 229.
 Sef. Caf. 278.
 pl. 218.

"UPON a motion to quash an order of sessions, the case
 "was thus:

"An order of two justices was made for removing *Richard Allen*
 "from the parish of *Shepton-Bechamp* to *Buckington*. On appeal
 "sessions confirmed the order, but stated the case specially—That
 "R. Allen was born at *Shepton-Bechamp*, but bound an apprentice
 "at twelve years of age to *John Cary* at *Buckington*, where he
 "lived forty days; but the master becoming a bankrupt, R. Allen
 "hired himself as a servant for a year to *Joshua Glover* in *Buck-*
 "ington, and served accordingly; during which service the appren-
 "ticeship expired, when *John Cary* delivered up the indentures to
 "Joseph Glover.

And it was insisted, that a hiring *de facto* should gain a settle-
 ment for a man, as well as a marriage *de facto* would gain dower for
 a woman.

Econtra.

To which it was answered, that this hiring could not gain any
 settlement, because the indenture of apprenticeship was still sub-
 sisting, and could not be discharged but by some other deed, or
 by the sessions, so that this was not a *lawful hiring*; and if so, then
 a service for a year in pursuance of such an illegal hiring, cannot
 gain a settlement.

* Anonymus

* Anonymus.

* P. 236.

A Motion was made to stay the proceedings on a judgment, suggesting, that (a) part of the money was paid, and that the defendant was willing to pay the rest into court.

To stay proceedings on a judgment, for that part of the money

was paid. (a) Though the defendant shews to the court a discharge from the plaintiff of part of the debt, yet if it appears to be given after purchasing the writ, or that the plaintiff's whole demand is not satisfied, or even that any part of the costs are unpaid, the court will permit the plaintiff to proceed. Far v. Burnley, Mich. 2 Geo. 2. C. B.

To which it was replied, that what money the plaintiff had already received, was in discharge of some other debts between him and the defendant; but upon producing his receipt, it appeared to be paid indefinitely, (viz.) As so much due upon account.

Where a debtor owes money to his creditor upon several accounts, he may pay part, and apply it to any debt; but if the creditor denies that he received it in satisfaction of that debt, but upon some other account, then he hath election to apply the payment to what debt he will; so where it appears that money is paid indefinitely, the creditor hath election to declare on what account he received it.

Curia.
See 16 Vin.
Abr. 278.
2 Stra. 1194.

Therefore if the debtor in the principal case would have this payment applied to the judgment, upon equitable terms, he should likewise pay or tender all the money due to the plaintiff on simple contract, or otherwise, as far as the penalty of the judgment covers such debts; for this court will not compel a creditor by judgment to accept a less sum than is due on the judgment, upon the account of any former indefinite payments, when there were other accounts depending between the parties, unless the defendant will consent to bring in all that is due to the plaintiff.

* Martin versus Henriques.

* P. 237.

UPON a scire facias on a judgment against the principal, he pleaded nul tiel record; whereupon the plaintiff produced the record, and the master signed the roll quod querens protulit recordum, and the plaintiff signed judgment the very next day, and took out execution, which upon a motion was set aside as irregular, because he ought not to have signed the judgment till four days after the record was brought in.

Judgment set aside, because signed within four days, &c.

Term. Pasch. 10 Georgii, 1724.

Chrifty *versus* Manucaptors of Anstruther. Thursday
23 Apr.

Debt in B. R.
upon a South-
sea contract,
and only
common bail
filed by reason
of the late act
of 7 Geo. II. c. 2.

UPON a writ of Error brought in the *Exchequer-chamber* on a judgment given in B. R. the now defendants entered into a *recognisance* pursuant to the * statute, that the plaintiff in error should prosecute his writ with effect; and if the judgment should be affirmed, then to pay the debt, damages and costs.

sect. 10. Judgment pro quer. Error brought in Cam. Scacc. where special bail was put in, who are bound in a sum certain, without any condition to render the body. Judgment affirmed. * 3 Jac. c. 8.

Afterwards the judgment was affirmed, and then the plaintiff brought an action of debt upon this *recognisance* against the bail; and the question was, whether they should be discharged upon common bail; and it was said by their counsel, that they ought to be discharged, for it is against the practice of the court, that bail should be required of bail.

Econtra.

It was never yet determined, that special bail is not requirable in an action of debt on a *recognisance* of bail; but the reason of the case seems to require it, because the *recognisance* is directly for payment of money, (*viz.*) To pay the debt if the judgment should be affirmed; and certainly it was never yet denied, that where an action of debt is brought on a bond for payment of money, but that special bail is always required; and the reason is the same for special bail in an action of debt upon a *recognisance* against the bail, for such *recognisance* is a security for the payment of the condemnation-money, and a collateral undertaking, that it shall be paid upon the affirmance of the judgment; and the bail upon the *recognisance* cannot be discharged, but upon payment of the money, for they cannot render the *principal*, because such render doth not

* P. 238. lie by the * bail upon a writ of error.

" *Curia* doubted; it depending on practice, and practisers not agreeing,

" *Fortescue* and *Raymond* Justices seemed of opinion, that special bail might be required; and thought that in debt upon a judgment special bail was always given.

" *Pratt* Ch. J. rather inclined to think so. *Adjournatur.*



Shipton

Shipton *versus* Hopton.

THIS was an action (a) *of debt, qui tam, &c.* brought by a common informer, on the statute 5 *Annæ, cap. 14.* for 15 *l.* wherein the plaintiff declared on two several counts, one for 10 *l.* for killing two partridges, the other for 5 *l.* for keeping an engine to destroy the game, not being qualified, &c. *virtute statutorum hujus regni;* upon *nil debet* pleaded, the plaintiff had a verdict for 5 *l.* only; and it was now moved, that he might enter the verdict on either of the counts, because the defendant intended to move in arrest of judgment; for though he might not be qualified by the statutes of this land to keep a *gun*, yet if he is otherwise *qualified by law*, he is not subject to this penalty.

Now he may be qualified by law, as being huntsman to a nobleman, who, in coming up to the parliament, may kill a deer in any of the King's forests; and this he may do by the Forest-law, which is part of the law of this realm; and for this reason the plaintiff was ordered to enter his judgment.

(a) This action is given by the statute (b) 8 *Georgii*, by which it is enacted, that where an offence shall be committed against any law for preserving the game, and the offender liable to pay a pecuniary penalty, upon a conviction before a justice, any person may sue for it by an action of debt.

(b) 8 *Geo.* cap. 19.
See now 26.
Geo. 2. c. 2.
2 *Geo. 3.*
c. 19.

* *Burges versus Bracher.*

THE case, *ff.* By articles made between the plaintiff and the defendant for a horse-match, it was agreed, that the plaintiff should ride without *whip or stick, or other weapons*, except boots and spurs; and in an action of covenant brought on these articles, the plaintiff set forth in his declaration, that he mounted the horse *sine flagello & baculo vel aliis armis*, and did ride in *forma prædicta*; upon the general issue the plaintiff had a verdict; and now it was moved in arrest of judgment, that this declaration was not pursuant to the articles of agreement, for that was to ride without *whip or stick, or * other weapons*, in the *disjunctive*; and the declaration is *sine flagello & baculo* in the *conjunctive*.

* This case was determined in *Trin.* 10 *Geo.* *Stra.* 594.

The agreement was in the copulative, and the breach was assigned in the disjunctive. 2 *Ld. Raym.* 1366. *Str.* 594.

* *P.* 239.

And this case was compared to some cases which were adjudged upon wagers in the late wars, (*viz.*) That the *English* would beat the *French* without the help of the *Germans* or *Dutch*; and in an action brought for the money won, the plaintiff laid in his declaration, that the *English* did beat the *French* without the help of the *Germans* and the *Dutch*; and this was held ill.

Term. Pasch. 10 Georgii, 1724.

Cro. Eliz.
229. pl. 19.

It was objected on the other side, that there is a case in * Cro. Eliz. where the defendant was by agreement to pay so much money when such a ship arrived *in such a port*; and the declaration was, that the ship arrived *ad portum*, instead of *in portu*; and this was moved in arrest of judgment, but not allowed: which is very true, because the preposition *ad* signifies *at* or *in*.

It is true likewise, that deeds (as it was said on the other side) ought to be favourably construed; and the reason is, because they are made by the consent of the parties; but it doth not follow from thence, that declarations ought to have a favourable construction; for the reason is not the same, because they charge the defendant in an adversary manner, and are presumed to be drawn by persons of skill; besides deeds are taken most strongly against the grantor. Cro. El. 348. pl. 23.

Besides, the riding without *whip and stick* alters the whole sense of the articles, for he may ride without both, but still he may ride with one of them; therefore the plaintiff should have laid in his declaration, that he rid without either.

“ *Reeve contra*. The averment is a good averment, and would be so on a demurrer; for the construction must be *sine flagello* & *sine baculo*, for *sine* is understood, and governs both the cases: and though the agreement varies in expression from the averment, yet both in substance are the same.

“ 2dly. The latter end of the sentence, being disjunctive *vel aliis armis*, must refer to every precedent allegation, and so make the whole disjunctive. 2 Bulstr. 293.

(a) Cro. El.
229. pl. 19.
Mo. 239. pl.
375.

3dly. If the averment was insufficient, yet it is cured by the verdict; for otherwise the plaintiff could never have a verdict; therefore it must be intended, that this was proved at the trial: (a) and there are several cases to warrant such *intendments*; to instance in one:

Poulter v.
Cornwall,
Salk. 9. pl. 2.

¶ *Indebitatus assumpsit* was brought for money received upon account; after a verdict for the plaintiff, it was moved in arrest of judgment, that this action would not lie, but an action of account; for if a man receives money to account, it is not to be demanded as a duty from him till he hath neglected or refused to account; and this must be set forth in the declaration: but it was adjudged, that the declaration was helped by the verdict, and that it shall be intended he refused to account, or had done something to make him an absolute debtor.

* Curia.

* P. 240.

If the terms of the agreement had not been proved at the trial, the plaintiff could not have a verdict; so it must be intended that the agreement was sufficiently proved; and there are several cases wherein it hath been adjudged, that where words may be taken in a double sense, the court, after a verdict, will always construe them in that sense which may support the verdict; now here the jury found, that the plaintiff did ride *sine flagello & baculo vel aliis ar-*

Term. Pasch. 10 Georgii, 1724.

mis, in which the disjunctive *vel* in the latter part of the sentence, qualifies the conjunctive *et*, and disjoins that copulative; so that it shall be taken in a disjunctive sense; so judgment was given for the plaintiff.

East-India Company *versus* Ellis.

AFTER a judgment by default for the plaintiff, and a writ of inquiry brought, it was moved, that it might be executed before the Chief Justice, at the sittings at Guildhall in London, the action being brought for 20000 *l.* and a rule was made accordingly.

Writ of inquiry executed before the Chief Justice.

Hutchinson *versus* Smith.

THE case, *ff.* One T. S. was arrested at the suit of the plaintiff *Hutchinson*, and *Smith* the defendant became bail to the sheriff for the appearance of the said T. S. at the return of the writ; but before any farther proceedings, *Hutchinson* died; yet his attorney took an assignment of the bail-bond, and proceeded to judgment and execution against the bail; and now the court was moved to set aside these proceedings as irregular; and the matter being so reported by the master, they were set aside.

The plaintiff died before the return.

The King *versus* Dunbarr.

UPON the master's report, the case appeared to be as followeth:

ff. The defendant *Dunbarr* was a prisoner in the *King's Bench*, and charged in execution there at the suit of one *Pilkington*, and afterwards was turned over to the *Fleet*, and there likewise charged in execution at the suit of the * same party; and on the 30th day of January last was taken in *Leicester Fields* upon an escape-warrant signed by one of the Judges of B. R. and then he insisted on a day-rule, but upon search there was none for that day; thereupon, as he was carried through the *Old Baily* towards *Newgate*, the officers of the *Fleet* rescued him.

Attachment against persons rescuing prisoner who was taken up on an escape-warrant.

* P. 241.

And now upon a motion for an attachment against them, and that *Dunbarr* might be taken out of the *Fleet* and sent to *Newgate*; it was insisted for him, that he being charged in execution in the *Fleet*, could not be taken by an escape-warrant issuing out of the court of *King's Bench*.

Besides, he thought he had a good day-rule, for his name was entered in the petition for day-rules on the 30th day of January, but the clerk did not come in time to have it read in court that day.

As

Term. Pasch. 10 Georgii, 1724.

Curia.

1 Anne,
cap. 6.

As to the objection, that this man being charged in execution in the *Fleet* (which is the prison of the court of Common Pleas) cannot be taken by an *escape-warrant* signed by any of the Judges of the court of King's Bench; it appears to be otherwise upon reading the * statute, by which it is enacted, That if any person charged in custody in the King's Bench or Fleet, in execution, or on mesne process, &c. shall go at large, upon oath made thereof in writing before the Judge of the court where the commitment, action, judgment or execution was, such Judge shall commit the person escaped to the common gaol of the county where retaken, there to remain without bail till discharged by law.

So that any Judge of the court where the action was brought may grant an escape-warrant; and a Judge of the Common Pleas may grant it, though the prisoner is turned over and charged in execution in the *King's Bench*, and so *vice versa*.

As to the entry of his name in the petition for a day-rule it signifies little unless it is read in court; therefore an attachment was granted against those who rescued *Dunbarr*, and a rule was made, that he should be taken out of the *Fleet* and sent to *Newgate*.

* P. 242.

* *Cloud versus Nicholson*.

Two were bound in a bond, and the action was brought against one.

THE case, *ff*. Two were jointly bound in a bond; and in an action brought against one alone, the plaintiff had a verdict; and it was now moved in arrest of judgment, that though this might have been pleaded in abatement of the action, yet since it appears upon the face of the record in which the bond was entered, that the plaintiff had no right against one alone, he cannot have judgment.

Curia.

The court were of opinion, that it did not appear on the record, that the other signed, sealed or delivered this bond; but admitting it did appear that he signed and sealed it, yet if it doth not appear that he delivered it, it is the bond of the defendant alone, though another is named therein with him, for it is not his deed without the delivery.

Bostock versus Bostock.

Money paid in discharge of interest.

THE case, upon the master's report, was as followeth:
ff. A bond was dated in the year 1706, conditioned for payment of a certain sum of money, and in the year 1709, 100*l*. part of the money, was paid; and by indorsement, reciting, that there was 3*l*. interest then due, it is expressed to be paid in discharge of the principal; and now the question was, Whether the 3*l*. interest then due, shall be taken to be part of the 100*l*. then paid;

Term. Pasch. 10 Georgii, 1724.

paid; if it is, then so much interest is discharged, and by consequence so much continues part of the principal still, for which interest must be paid; whereas if the 31*l.* interest was not discharged, no interest would be due for it, because it is originally interest.

The court seemed to incline, that the 100*l.* then paid should be in discharge of the interest then due, and for the residue in discharge of so much of the principal.

* Hawker *versus* Hinton.

* P. 243.

UPON a writ of error of a judgment in the Common Pleas, the error assigned was, a *variance* between the original and the declaration, the one being *Jemimman*, the other *Jememman* Continuances may be entered at any time.
Force.

On the other side it was said, that the record was right; and upon producing it, so it was, but it was of another number-roll. Econtra.

Then it was objected, that the original was *anno* 7 *Georgii*, and the declaration was *anno* 9, and no *continuances* entered between the one and the other.

To which it was answered, that the *continuances* might be entered at any time, and that when entered the plaintiff is intitled to his judgment.

The court was of opinion, that the attorney ought to be punished Curia. for making up a second record, but that the plaintiff must have his judgment.

Crowther *versus* Wheat.

SCIRE *facias* was brought against the *bail*, and their attorney demanded *oyer* of the writ, and saw many rasures and interlineations in it, and for that reason he did not make any defence, but now moved the court, that all the proceedings thereon might be quashed. A writ altered after it is sealed, this is a great misdemeanor.

The court was of opinion, that this was no ground to quash the proceedings, for if any alteration was made in a thing immaterial, Curia. See 6 Mod. 310. after the sealing the writ, there is no harm done; and if in any thing material before the writ was sealed, yet that will not vitiate it; so the court would not quash it, or any proceedings thereon, but said, if the motion had been made against the clerk who rased it, and it appeared to be done after the writ was sealed, it is a misdemeanor, and punishable.

* P. 244.

* Anonymus. In the court of Exchequer.

Where the plaintiff must have a prerogative administration, or take administration in that diocese where the judgment was entered.

IN an action of debt against the sheriff, the case was thus: *A.* by his last will and testament made *B.* his executor, and died; the executor proved the will before the commissary of the bishop of *Litchfield*, and as executor of *A.* brought an action against *C.* and obtained a verdict and judgment, and thereupon *C.* was taken in execution upon a *Ca. sa.* and committed, and afterwards escaped. Then *B.* the executor died intestate, and *D.* took out administration *cum testamento annexato de bonis non* of *A.* in the diocese of *Litchfield*, and brought this action of debt against the sheriff for this escape, who demurred, for that the judgment being the foundation of this action, and that being entered in *Middlesex*, the plaintiff could have no right to it by virtue of an administration taken in the diocese of *Litchfield*, which as to this demand was void, for he ought to have a prerogative administration.

Econtra.

But the counsel for the plaintiff insisted, that this action would lie for two reasons:

(1.) First, because the *escape* which was in the diocese of *Litchfield* was the principal and immediate cause of the action, and the judgment set forth in the declaration was only an inducement to it.

(2.) The other reason was, that it was not in the power of the executor to alter the condition of his testator, so as to put the administrator to take out a *prerogative administration*; for he took it *cum testamento annexato*; so he should have it in the same condition it was in at the death of the testator; and one of the barons was of that opinion.

Curia.

But three of the barons, of which the chief baron was one, were of opinion, that the plaintiff could not maintain this action without taking out a prerogative administration, or an administration where the judgment was entered, and that was in the diocese of *London*; that it was absolutely necessary he must take out administration somewhere, and that there could be no inconveniency in taking out

Cro. Eliz. (472.) pl. 25.

administration above, according to the case in *Cro. Eliz.* where it was held, that a man dying in one diocese, and having a bond in another diocese, in such case there must be a prerogative administration, because the debt doth not follow the person, * but it is a debt where the bond is at the time of the decease of the intestate.

* P. 245.

(a) Salk. 40. pl. 9.
2 Ld. Raym. 854, 1253.
6 Mod. 136.
(b) 1 Vern. 397. Jauncy v. Sealey.

So in (a) *Salkeld* it was held, that administration granted by the archdeacon of *Dorset* could be no title to a judgment in any of the courts at *Westminster*; it is true, a will of a personal estate which lies in a foreign country, and none in *England*, may be (b) proved in that country where the estate is, and need not be proved here.

* Rex

Term. Pasch 10 Georgii, 1724.

* *Rex versus Burridge.* Wednesday 10 June.

A Rule of court was made by consent, that the sheriff of the county of *Devon* should bring the freeholders book before the master of the office, and that he should return forty-eight men, and that each of the parties should be at liberty to strike out twelve, and that the master should appoint the twenty-four remaining to be returned by the sheriff to try the issue joined between the parties.

This rule was made by consent, and afterwards when the parties attended the master, the defendant struck out some *hundredors*, and at the trial he challenged the *array* for want of *hundredors*; and the judge of assise allowed the challenge, and directed, that the plaintiff in the action might take what remedy he could by law.

Thereupon it was now moved for an attachment against the defendant, for that this challenge to the array was a breach of the rule of court, and a contempt thereof.

And it was argued for him, that his entring into this rule did not take from him the liberty of challenging the jury; if it did, it must be by implication, which could never be a good foundation for an attachment; for the cause to issue out an attachment should be as certain as the cause to warrant a judgment, and there was never yet an attachment granted in such a case.

There are rules where there was an express injunction not to challenge; as in *Dunster's case*, 10 *El.* in which rule it was ordered, *quod nulla sit calumnia de utraque parte pannello*; and there are other rules where it was insisted on, but denied, as in the case of *The King versus Kiffin*, *Paschæ* 29 *Car.* 2. a rule was made (as in this case for striking a special jury; and *Jones Attorney General* moved, that it might be inserted in the rule, that neither of the parties should be at liberty to challenge the array; but it was denied *per totam curiam*; for it could not be granted but by consent; and it was not at that time pretended, that * this was implied in the rule, for if it had, he need not have moved the court, that it might be expressed.

In the case of *The King versus Sherard*, anno 1 *Georgii*, these words were added to the like rule, by consent of both parties, *quod nullum advantagium capiatur pro defectu hundredor.* 2 *Rol. Rep.* 365. But admitting this was implied by the rule, yet the defendant cannot be said to be guilty of a contempt for challenging the array, for 'tis no more than an inadvertency, or a mistake of the sense and meaning of the rule.

Now the different way of drawing up these rules, sheweth, that there must be an express consent of the parties not to challenge; otherwise no attachment will lie for challenging, neither will such consent take away any legal objection the party hath to challenge; and if such a rule (as in the principal case) would serve, what reason

* It was determined in Trin. 10 Geo. Stra. 593.

Special jury by consent and not to challenge. 2 *Ld. Raym.* 1364. Stra. 593. Andr. 52. Ante 186.

For the defendant.

3 *Keb. Rep.* 740. pl. 1.

* P. 246.

Term. Pasch. 10 Georgii, 1724.

reason can be given why an express consent should be put in so many rules for striking special juries?

Judgment
given by a
judge of assise
after he came
to town.

Besides, this matter hath received judgment already, for the rule was produced at the assises, and pleaded in bar to this *challenge*, and the defendant demurred to it; and the plaintiff joined in demurrer; and when the judge came to town, he gave judgment for the defendant, at which the chief justice seemed to be surprized, that a judge should give judgment after he came to town; but the counsel for the defendant said he might, when it was by the consent of the parties; as where a verdict is found, and the judge takes time to consider what judgment to pronounce, or what fine to set; and for these reasons it was insisted, that no attachment should go.

Econtra.

It was insisted for the attachment, that this challenge was a contempt to the court, and a breach of their rule, for that was, that the master should appoint twenty-four to be returned by the sheriff to try the issue; now this *challenge to the array* destroyed this rule, for it was a *superfedeas* of the whole return, like a rule of court or bond to stand to an award; yet if the party retracts the submission, it is a breach of such rule, and a forfeiture of the bond, both which are implied in the submission, for *qui adimit medium destruit finem*.

The defendant might have taken a challenge to the *polls*, but he knew that would be supplied by *talesmen*; therefore to make all sure, and to prevent the trial, he took a challenge to the *array* for want of hundredors, and this with an air * of insolence, after he had been summoned to appear before the chief justice of this court, and had his opinion, that he (the defendant) could not strike out all the hundredors; for which reasons it was insisted, that the attachment might issue.

Curia.

The court was of opinion, that the defendant was guilty of a premeditated contempt, because his challenge drawn up in form, and arraigned at the assises, shews his design was to put off the trial.

As to the rule made in this case, it may be without the consent of the parties, as well where the trial is by *nisi prius* as at bar, and that likewise in criminal cases as well as civil, and without any infringement of the liberty of the subject, but rather for the sake of justice, and to preserve their liberties; and if such challenges are good, these rules would be avoided and made useless, which is a contempt of this court; and the case cited between *The King* and *Kiffin*, to shew, that the party may challenge, if 'tis not expressly

(a) They did
not say that
that case was
wrong resolu-
ved, but that

prohibited in the rule, is (a) wrong; for though 'tis not expressed, yet if it be necessarily implied, the power of challenging is taken away; for otherwise these rules would be to little purpose.

it did not prove what it was cited for; they agreed that if it was not expressed, it was implied. Pratt Ch. Just said that but two precedents had been quoted, which had such clauses, he said that upon search they found the rules of B. R. to have been so.

Now

Now this rule is, that the issue shall be tried *per residuum juratorum*, but challenging the *array* is as much as to say, it shall not be tried by that jury, and that the sheriff ought not to return them, when he was bound by the rule to return those, and no other.

Now, as the court hath a power to enforce obedience to their own rules, 'tis but reasonable they should punish those who brake them; so the rule was made absolute for an attachment.

Afterwards the defendant *Burridge* gave bail on the attachment, and Mr. *Crews*, who was his attorney and under-sheriff, was one of the bail; then the prosecutor moved, that the high-sheriff might return the jury to try this cause, because the under-sheriff, who hath *retorna brevium*, was attorney in the cause and bail on the attachment; and a motion was made for a special jury; and a question being put, Whether that could be granted without the consent of the parties; the master of the office was ordered to search for precedents; and he reported, that above thirty years ago there were several precedents for special juries upon trials for *nisi prius*, without the consent of * the parties; but that in the last thirty years there were several motions made for that purpose, but always denied.

Special juries
without con-
sent of par-
ties.

* P. 248.

To which the *Chief Justice* answered, that if the court could once grant motions for special juries, without the consent of the parties, to try causes at the assises, as it appears by the precedents they might; it was discretionary in the court, whether to grant such motions, or not; for though it was often denied, it cannot be inferred from thence but that the court may still do it, where it seems reasonable for them so to do.

But all the other three Judges were of another opinion, because the sheriff is the proper officer to return juries; and if there is no legal exception against him, the court cannot slip him, and order another to strike a special jury, without the consent of the parties, to try an issue at the assises; but if there is any lawful objection against him, and it appears to be so upon affidavit made, then a special jury may be struck by the master of the office, without the consent of the parties; now, all that was shewn in this case, why there should be a special jury, was, that the defendant made *affidavit*, that he feared he could not have a fair trial without such a jury; then it was offered as a reason why there should be a special jury to try this cause at the next assises, because such a jury was thought requisite to try it at the last assises.

But three of the Judges were of opinion, that a special jury might be granted to try a cause *at bar* without the consent of the parties, but never at the *nisi prius*, unless very good cause was shewed, and that the cause now shewed was not sufficient; therefore since the high-sheriff is the proper officer to return juries, and there is no imputation against him (as there was not in this case) the court would not vary from him without the consent of the parties;

Term, Pasch O Georgii, 1724.

ties; so he was ordered to return this jury; and in the same term there was another motion for a special jury in a case between *Goodright* and *Mist*; and the like rule was made.

Anonymus.

Indictment
for stealing
the goods of
an unknown
person.

* P. 249.

AT a sessions of *oyer and terminer* held at the *Old Baily* in April last, this case happened, (*viz.*) A loose and idle person was apprehended at *Southampton*, and being brought before a justice of peace, a silver tankard was * found in his possession, and he giving no satisfactory account how he came by it, and the justice suspecting he stole it, committed him to prison; and being brought by *babeas corpus* to *Newgate*, he was indicted for stealing a silver tankard, value 10 l. of the goods and chattels of a *person unknown*; and at the trial the prosecutor offered to give evidence, that this was a loose and disorderly person, and therefore it must be presumed that he could have no property in the tankard, but that he stole it.

Lord Ch. Just.
Hale said,
that he would
never convict
any person for
stealing the
goods *cujus-*
dam ignoti,
merely be-

cause he would not give an account how he came by them, unless there were due proof made, that a felony was committed of these goods. 2 Hale's Hist. Pl. Cr. 290.

Baggott versus Oughton.

L.C. Just. 301. & *Reverend* 392.

UPON a case stated, and referred out of the Chancery for the judgment of this court, it was thus:

Power to
make leases
reserved in a
marriage set-
tlement.

Sir *Edward Baggott* (the father of the plaintiff) upon his marriage with his wife, the plaintiff's mother, in consideration of that marriage, and of a considerable sum of money which he was to have with her as a marriage-portion, which could not be raised otherwise than by selling her father's estate; and she being the only child of the family; and for that reason, *Sir Edward* being unwilling the estate should be sold, it was agreed by indenture between them, that a fine should be levied of the lands, and the uses thereof declared to *Sir Edward* for life, then to the use of his wife for life, remainder to the plaintiff in tail, &c. reversion in fee to the Lady *Baggott*, in which settlement there was a proviso, that the Lady *Baggott* should have power to charge the whole estate with the payment of 500 l. to any person to whom she should give the same; and with a farther power, that any person who should be actually seized

Term. Pasch. 10 Georgii, 1724.

seised of the lands by virtue of this settlement, might make a lease or leases for three lives, or for twenty-one years, of all or any part of the premises in the indenture or fine comprised at such yearly rents, or more, as the same were then let at.

* Sir Edward Baggott died, and the Lady Baggott being the next * P. 250.
in remainder for life, entered, and afterwards married Sir Adolphus Oughton (the now defendant) and then made a lease to him of the capital messuage for twenty-one years, but reserved no rent, and about a month afterwards she died; and the single question now before the court for their opinion was,

Whether this was a good lease?

And it was argued for the plaintiff, that it was not, because this capital messuage being never yet let, by consequence there was no rent reserved at the time of making this settlement, therefore this power can never be pursued, and for this the Lord * Mountjoy's case * 5 Rep. 3. was cited as an authority in point, which was thus:

Tenant in tail, with a power to make leases, &c. reserving the *antient rent*, made a lease of two distinct farms, reserving the antient rents out of both the farms in one entire sum: this was adjudged a new rent, and not the old accustomed rent; and that if he reserve a less sum than the accustomed rent, the lease is void.

So in *Fitzwilliams's case* it was resolved, that powers by which the interest of strangers shall be charged, must be taken strictly, as a power to make leases for 21 years; he who hath such a power cannot make a lease for 21 years to commence in *future*.

The power in the principal case reserved to make leases was intended for the benefit of the family, (*viz.*) To make leases of such lands which had been actually, antiently, and usually let; and though it was indefinitely to make leases of all, or any part of the premises comprised in the indenture of fine, yet these words are restrained in the latter part of the sentence to such leases, where the yearly rents, or more, were reserved, *as the same were let at when the settlement was made*; and the authorities in the * margin were cited, to prove that general words in a deed are to be qualified and restrained by particular and subsequent words in the same clause.

It is true, this Lady had an interest coupled with her power, but her interest in respect to any charge to affect the remainder-man is intirely void; for this lease, as to him, must arise out of her power, and is no more than if made by an attorney; now, supposing she had made a lease of lands *not in possession*, such lease would have been absolutely void, neither shall a lease, *without rent reserved*, be good to charge the plaintiff, who is the remainder-man. * P. 251.

Besides, Sir Walter Baggott (the now plaintiff) is a purchaser of this estate under the said settlement, and is heir at law both to Sir Edward and the Lady, to whom this power was reserved; and all

Term. Pasch. 10 Georgii, 1724.

* 8 Rep. 70. all powers given to tenants for life should be * strictly construed,
 2 Cro. 318, because they make the estate to continue as a charge on those in re-
 458. mainder; therefore the words, (*viz.*) *To make leases, &c. at such*
 1 Roll. 12. *yearly rents, or more, as the same were then let,* must restrain this
 Palm. 104. power to make leases only of such lands which were let at that
 3 Mod. 378. time.
 Salk. 537.

Econtra.

On the other side it was argued for the defendant, that this was a good lease, and well warranted by the power, which is for the tenant in possession to make leases of all or any part of the lands comprised in the indenture or fine, &c.

Now, if the power had rested there, this lease had been certainly good, and nothing could be objected to make it otherwise; but it hath been said, that the subsequent words, (*viz.*) *To make leases at such yearly rents as the same were let at that time,* restrains this power to lands which were then let, and this capital messuage being never let, this power could never extend to it.

But these subsequent words are only explanatory of the first part of the sentence, (*viz.*) That the lands usually let may be leased at the usual rent; now, by the first part of the proviso, the tenant in possession had power to make leases of all or any part of the lands comprised in the settlement; and the subsequent part of the clause shall not control that power without negative words, and there are no such words in this case.

Besides, this power is reserved to the *Lady Baggott*, who had the inheritance of these lands, and from whom all the estates in the settlement moved; and it is not a power superadded to the estate of a third person, so should have a * very favourable construction.

* 2 Vent. 350.

As to the *Lord Mountjoy's* case, there are some points resolved, which have since been denied to be law; and in 2 *Roll. Abr.* 262.

+ 1 Vent. 294.

there is a contrary resolution, but the case of + *Walker* versus

2 Lev. 150.

Wakeman is full in point, *ff.* It was a conveyance of lands and a rectory, to the use of *T. S.* for life, with a power to make a lease

* P. 252.

of the premises, or of any part thereof, so as 5 s. rent was * reserved for every acre of land; the tenant for life made a lease of the rectory, reserving a rent; now this not being land, but consisting in tithes; the question was, whether this lease was warranted by that power; and adjudged that it was, because the restrictive clause was in the affirmative, and shall not restrain the general words in the preceding part of the sentence; it is true, the Lord Chief Justice *Hale* said, that if this had been *res integra*, he should have been of another opinion.

Now, as to the construction of powers, it is various, according to the intent of those by whom they were created, for sometimes they are construed liberally, and sometimes very strictly; but the power in the principal case being reserved to her who had the inheritance of the estate originally before the settlement was made, is

part of her old dominion; and where the execution of such a power is agreeable to the intention of the donor, and consistent with his will at the time it was created, it must have a very liberal and favourable construction; and this was the concurrent opinion of the court of Chancery in the last term, assisted by the Master of the Rolls, and by *Baron Gilbert* and *Price*, in the case of the *Lord and Lady Coventry*.

To which it was answered, that it is not material whether the estate moved from the *Lady Baggott*, as being her inheritance before this settlement was made, because the court will judge of this power as it appears upon the face of that settlement.

It is true, there are no negative words simply in the subsequent part of this clause to control the power given in the precedent part; but there are restrictive words, which imply a negative, and restrain the tenant from overcharging the reversioner.

It is to be observed, that the *Lord Chief Justice Vaughan*, in delivering the opinion of the court in a case * reported by him, said, * *Vaugh. 55.* that where power is given to make leases of lands for twenty-one years, reserving the rents which were thereon reserved at the time of the making the deed, that in such case the lands demisable by that power, must be lands then in lease on which some rent is reserved; and the court was unanimous of that opinion for the plaintiff in this case.

* P. 253.

* D E

Term. Sanct. Trin.

Anno 10 Georgii, 1725.

Shaw versus Way.

Where a man may have a fee simple by devise without the word heirs; and where the devisees take an estate for life with contingent remainders, &c.

3 Dan. Abr. 178 pl. 26.
Eq. Caf. Abr. 184. pl. 28.
Portesc. Rep. 158.
Stra. 798.
Fitzgib. 7.
Barnard. K. B. 54. cited in Andr. 339.
Post. 382.
* But did not say to their heirs.

IN a special verdict in ejectment, the case was thus:
ff. *Thomas Ravenscroft* being seised in fee of lands, &c. in the parish of *Hawarden* in the county of *Flint*, did by his last will devise the same unto *Dorothy* his wife for life; and farther, he devised to his said wife the sum of 500 l. to be raised by her, or by her executors, &c. by sale of timber-trees, or by sale of any part of the lands, or by digging, sinking, getting, and sale of coals on the premises, &c. at her choice, or at the election of her executors; and that if his said wife should die before the said sum of 500 l. was raised, then he gave her power, either by deed or will, in her life-time, to appoint any person to raise the same after her death, in manner as aforesaid; but if either of his sisters, *Anne Lunsford*, or *Dorothy Evatt*, or the trustees named in his will, shall pay unto his said wife, or to her executors, &c. the said sum of 500 l. then the power of selling timber, &c. shall cease.

And after the decease of his said wife, he devised the said lands to *Francis Bramston*, serjeant at law, *Charles Nott* and *Edward Parry*, and to the survivor * and survivors of them, (subject to the raising the 500 l.) upon trust for his said sisters, equally between them during their lives, without committing any waste; and that if they happen to die leaving issue or issues of their bodies, then in trust, that the mother's share shall be for such issue or issues, or else in

* trust for the survivor or survivors of them, and their respective issue or issues; and that if + both his said sisters shall die without issue, or having issue, such issue shall die without issue, then the said trustees shall stand and be entrusted for *John Swift*, and the heirs males of his body; and for want of such issue, then in trust for *Ravenscroft Gifford*, and the heirs males of his body, with several remainders over.

* P. 254.

+ This makes cross remainders.

They

Term. S. Trin. 10 Georgii, 1725.

They find, that *Thomas Ravenscroft* died seised of the premises without issue, and that *Dorothy* his widow survived and entered, and died seised; that after her death *Anne Lunsford*, and *Dorothy Evatt* entered and were seised, and that *Anne Lunsford* died, never having any issue, and that *Dorothy Evatt* survived; and that after the death of the said *Ann*, she entered on the whole, and was thereof seised, and levied a fine at the grand sessions in *Flintshire*, anno 4 Jac. 2. of the premises, by the name of four messuages, &c. and declared the uses thereof to *Thomas Williams* and his heirs, until a common recovery should be had, &c. and that in the same year a common recovery was suffered in the said court, and the uses thereof declared to the said *Dorothy Evatt*, her heirs and assigns for ever.

They farther find, that the said *Dorothy Evatt* was heir at law to the testator, and that *John Swift* was dead without issue.

That *Ravenscroft Gifford*, anno 1693, and in the life-time of the said *Dorothy Evatt* and *John Swift*, went beyond sea, and there continued twenty-six years, until the year 1719, that the said *Francis Bramston* and *Charles Nott* died in the life-time of *Edward Parry*; that the said *Dorothy Evatt* died anno 1698, without issue, and that she never had any issue of her body; that the said *Ravenscroft Gifford* entered and was seised, and being so seised, he demised the lands to *William Shaw*, the plaintiff, anno 5 Georgii, for seven years, by virtue of which demise he entered and was possessed, until he was ejected by the defendant, and so they make a general conclusion.

This case came before the court by writ of error from the grand sessions of *Wales*, where judgment was given for the defendant, and the counsel for the plaintiff made these questions:

(1.) What estate the trustees took by this will? what estate the two sisters had? (i. e.) whether they

* (2.) Took an Estate for life in common, or an estate-tail. * P. 255.

(3.) Whether judgment ought to be given for the plaintiff for a moiety, no cross remainders being limited by the will to the sisters.

1. And as to the first point it was argued, that the trustees had a fee-simple, tho' the devise was not expressly to them and their heirs; for if they should have a less estate it would not support the trusts which were afterwards limited in this will, so that the intent of the testator would not be compleated, because the several devises afterwards made must arise out of the estate devised to them.

And though in feoffments or grants, the word *heirs* is necessary to raise a fee, yet it is otherwise in wills, for there any words which shew that the testator intended to pass a fee, will be sufficient to make it so; as for instance; a devise of lands to T. S. for ever;

Term. S. Trin. 10 Georgii, 1725.

(a) Willock v. Hammond, Cro. Eliz. 204. pl. 39. 3 Rep. 20. 21. a. S. C. So a (a) devise of lands to his wife for life, remainder to his eldest son, *paying* to his brothers and sisters 40s. a-piece; here was no estate devised to the eldest son, but the word *paying* made it a fee-simple.

Spicer v. Spicer, Godb. 280. Cro. Jac. 527. pl. 3. S. C. 2 Rol. Rep. 80. S. C. (b) Walker v. Collier, Cro. Eliz. 378. pl. 29. 6 Rep. 16. a. S. C. So a devise to his son, paying 3 l. *per annum* to his brother; this was adjudged a fee-simple in the son, because the charge to his brother might survive and continue after the death of the devisee; and so it is in all cases where the word *paying* is collateral, (i. e.) where it is not said *out of the (b) profits of the land*; so a devise of all his real estate passes a fee, because the word estate being *genus generalissimum*, comprehends the whole, both real and personal; and the words (c) *All my estate*, are a description of the fee; so a devise of *all his lands of inheritance*, if the law will permit; it was adjudged that a (d) fee passed.

(c) Countess of Bridgwater v. The Duke of Bolton, Salk. 236. pl. 15. 2 Ld. Raym. 968. Eq. Caf. Abr. 177. pl. 17. S. C. cited in 2 Wil. Rep. 524. by Jekyll Master of the Rolls, as a resolution given on great consideration, in which Lord Chan. Cowper, when of counsel, discouraged a writ of error in parliament. S. C. cited by Talbot Chan. Caf. temp. Talb. 162. Fortesc. Rep. 63. (d) Whitlock v. Harding, Moor 873. Godb. 207. Hob. 2. S. C. Rol. Abr. 835. S. C.

So when the testator was seised in fee, and devised *four coats to four poor boys of the parish of C. for ever*; and all his lands to his wife Margaret, and her assigns; adjudged, that (e) Margaret had a fee-simple, because she took the lands with a perpetual Charge.

(e) Smith v. Tindall, 2 Salk. 685. So in the principal case it plainly appears, that the testator intended the trusts appointed in his will should be supported, * and if that cannot be done but by an estate in fee, the trustees must necessarily have such an estate; and if they took a fee-simple, then the trusts are executed by the statute of uses, and then *Ravencroft Gifford* (the lessor of the plaintiff) had an estate-tail executed in him.

(2.) The second and the chief question was, what estate the sisters took by this will; and as to that point it was argued, that they took an estate *for life only, with contingent remainders in tail to their issues*, and that it was the intention of the testator, that they should have no larger an estate, because of that restriction in his will, *from committing waste*, and an express power of digging coal; both which would have been implied if he had intended them an estate-tail; therefore these things are a sufficient indication of his intent to give them an estate for life only.

As to that clause, *ff. If either of them die leaving issue or issues of their bodies*, then in trust, that the mother's share shall be for such issue or issues, or else in trust for the *survivor or survivors of them*; this is a joint estate-tail to the issue, upon a contingency; for otherwise the word *survivors* would be inconsistent, because there were but two sisters, for there could be no *survivors* between two.

It is true, if the devise had been to them for *life, and after their death to their issue*, that would have been an estate-tail; as for *in-
stance;*

stance; a devise to * *Barnard* for life, and after his decease, to the issue of his body; this was adjudged an estate-tail.

* King v. Meling,
2 Lev. 58.
1 Vent. 214.

But the case of *Loddington* versus *Kime* is in point, which was thus: A devise to his uncle for life, without impeachment of Waste, and if he hath issue male, then to such issue male and his heirs for ever, and if he die without issue male, then to his nephew in fee; this was adjudged an estate for life in the uncle; for if the testator had intended an estate-tail, it had been impertinent to have added these words, (*viz.*) *Without impeachment of waste*; and the inheritance being vested in the issue male and his heirs, these words *his heirs*, make it certain what issue male was intended; then the subsequent clause, (*viz.*) *If he die without issue*, must be construed to relate to what went before, (*viz.*) *If he die without such issue then living*, who might take the inheritance as before directed by the will, for otherwise those words would make an estate-tail by implication, to destroy an express estate before limited to the issue male and his * heirs; so in this case the will being, *that if both his sisters die without issue*, it must be intended *issue then living*, and capable of taking the inheritance.

3 Lev. 431.
Loddington
v *Kime*.
Ld. Raym.
203, 209.
2 Stra 801.
10 Mod. 403.
Fitzgib. 15.
21.
Fortesc. Rep.
67, 74.

P. 257.

Besides, all the devises over being expressly in tail, shew, that the testator intended only an estate for life to his sisters.

(3.) As to the third point, whether judgment should be given for the plaintiff for a moiety, if the court should be of opinion, that the sisters had an estate-tail; it was argued that it shall, because the sisters being tenants in common, in such case, after the death of either of them without issue, the remainder takes place immediately with respect to her moiety, and the word *survivors* must relate to their issue.

On the other side, the first point was agreed, that the trustees took an estate in fee for the reasons before-mentioned; so it was chiefly argued upon the second point, (*viz.*) That the sisters took an estate-tail with cross remainders to their issue, which may be inferred from these words, (*viz.*) *If either of my sisters happen to die leaving issue or issues of their bodies, and if both die without issue, then in trust for Ravenscroft Gifford, &c.*

Econtra:

Now it is certain, that the word *issue* is as effectual to create an estate of inheritance, as the words *heirs of the body*; it is mentioned in several statutes, and particularly in the statute *de donis*, &c. and in the statute of * wills; so as to the vesting and continuing of estates, it is the same, and as effectual as the words *heirs of the body*; and it is more comprehensive than a devise to one for life, and after his decease to his children, which was † *Wild's* case; it is true, in that case it was held an estate for life in the devisee, because he had a son and a daughter then living; but if there had been none then living, this would have been an estate-tail; and so it must be in this case, and for the same reason, (*viz.*) Because the sisters never had any issue.

* 32 H. 8.

† 6 Rep. 16.
Moor 397.

Moor. 127.
Roll. Abr.
837.
See 1 Vent.
230.

So a devise to his wife *for life*, and afterwards to her son, and if he die without issue, having no Son, remainder over; adjudged an estate-tail in the son.

Lev. 290.
Sutton v.
Sammon, Hil.
7 Geo.
Fortesc. Rep.
66.
Fitzgib. 13,
26.

So in a late case in the Exchequer, which was thus: *Sutton* devised his lands to *Thomas Sutton for life*, remainder to his first son in tail; and if *Thomas Sutton* and his wife shall die without issue, remainder to charitable uses; a bill was exhibited in the Exchequer to establish this charity, and the defendant pleaded, that *Thomas Sutton* suffered a common recovery, and declared the uses to himself * and his heirs, which plea was allowed; it is true, that upon an appeal to the house of Lords, the defendant was ordered to answer, but it was on the foot of being a devise to a charity; and though the testator might intend it for a charity, yet since by operation of law it was an estate-tail, that must be observed.

* T. Raym.
452.
T. Jo. 172.
† It is not
said, If either
of them die.

(3.) As to the third point, admitting this is an *estate-tail* in the sisters, then they will have cross remainders by implication; and for this the case of * *Holmes and Meynell* is an authority in point.

§. The testator devised his Lands to his two daughters and their heirs, equally to be divided between them, and if † they die without issue, then all his land to his nephew *Francis* in tail; the youngest daughter died without issue: adjudged, that the surviving sister shall have the whole by implication, for that the daughters had several estates-tail by moieties, and the survivor shall have the whole by way of cross remainder, and *Francis* shall have nothing by implication, but must stay till both the daughters are dead without issue.

Therefore if *Dorothy Evatt*, who survived her sister, had the whole estate by way of cross remainder, she having suffered a common recovery, all the remainders over are barred thereby.

It was admitted on the other side, that were there a devise to one for life, and after his death to his issue, remainder over, this is an estate-tail; and so it was adjudged in *Melling's* case, which doth not differ from the present case; for here the devise was to his sisters for life, and if they die without issue, remainder over; so that in the one case a remainder is limited after a dying without issue, and in the other case it was limited, if they die without issue.

Andr. 339.
2 Stra. 801.
Eq. Caf. Abr.
185. pl. 29.
Fortesc. Rep.
66.
Fitzgib. 13.

So in the case of *Langley v. Baldwin*, which was referred out of Chancery, to the judges of the Common Pleas for their opinion, which was thus, §. The testator devised his lands to *Jonathan Langley* for life, without impeachment of waste, remainder to *J. S.* his grandchild for life, without impeachment of waste, with a power to him to make a jointure of the same land to any woman he should marry for her life; and after his death he devised the lands to the first son of *J. S.* the grandchild in tail, and so to the sixth son, and then devised, that if *J. S.* the grandchild should die without issue male, the land should remain to *J. B.* and the question

“question was, what estate *J. B.* took by the will; and it was cer-
 “nified by the court of *C. B.* that he took an estate * tail; which
 “was decreed accordingly.

* Note: By
 Raymond C.

of *Shaw and Weigh*, an estate-tail was raised here by implication, because the express devise was not to all
 the sons; for if there had been more than six, and the six dead, must the heir at law have it before a seventh
 son? *Eq. Cas. Abr. 185. pl. 29. Fitzgib. 26. Fortes. Rep. 79. 2 Stra. 805.*

As to the concomitant clauses, if the words in a will are sufficient
 to raise an estate-tail, these clauses, (*viz.*) *With or without impeach-*
ment of waste, or any power to raise money, by cutting and selling
 timber, or otherwise, shall not control the devise.

* As to the case of *Loddington versus Kime*, it comes near to the
 present case, but yet it is not an authority in point; for there the
 devise was to one for life; and if he hath issue male, then to such
 issue male and *his heirs*: now there the inheritance being vested in
 the issue male and *his heirs*, these words *his heirs* are a description of
 the person who is to take; but in the present case there is no de-
 scription of the person who is to take as issue; therefore it must
 be such issue *who is living* at the time of the death of the sisters; and
 if so, then it is a proper limitation and not a purchase, and the rather
 because the devise is expressly to the sisters for life, and to their issue
 only on a contingency; but if it had been to them for life, and that
 if they die without issue, remainder over, that would be an estate-
 tail, and all the cases cited on the other side prove no more.

* P. 259.

As for the concomitant clauses in this will, (*viz.*) *with or with-*
out impeachment of waste, or a power to raise money by sale of
 timber, &c. it hath been objected that they are only directory, and
 shall not control the granting part of the will, which is very true;
 but where the devise is to be collected from the intention of the
 testator, and to be supported only by implication, certainly those
 clauses are good to explain what the testator intended.

(3.) As to the third point, (*viz.*) if the sisters have an estate-
 tail, then whether *cross remainders* are limited to them by this will;
 this question entirely depends on these words, (*viz.*) *the survivor*
or survivors of them; the clause is, *if his sisters die leaving issue of*
their bodies, then the mother's share shall be for such issue or issues,
 or else for *the survivor or survivors of them*; now it was argued, that
 the word survivors must of necessity relate to the issue; for other-
 wise it would be inconsistent, because there being but two sisters,
 it is impossible it should relate to them, for there can be no sur-
 vivors between two; therefore it must relate to the issue; and if so,
 the sisters took no estate by cross remainders; therefore judgment
 ought to be for the plaintiff in error for a moiety.

It was held clearly by the court as to the first point, that the
 trustees had a fee-simple; for where it appears upon the face of the
 will, that the testator intended to give such an estate by necessary
 implication, as by limiting such trusts which could not be supported,
 unless,

Curia.

Term of Trinity 10 Georgii, 1725.

† Rol. Abr. 611. unless the trustees had a $\dagger$ fee-simple, in such case a fee shall pass to them, and that the trusts were executed by the statute of uses.

* P. 260. * As to the second which was the chief point, the Chief Justice was of opinion, that this was not a contingent remainder in tail to the issue of the sisters, and that a limitation to *the issue* doth not differ from a limitation to *the heirs of the body*; it is true it hath been held, that where an express estate *for life* is devised, in such case no subsequent words shall create an *estate-tail by implication*; but this is an old antiquated and exploded opinion, and contrary to the later authorities; and in this case the subsequent words, (*viz.*) *without committing waste* do not control the devise.

It is true where an estate *for life* is devised to one, with a provision immediately for all his sons successively, and if *he die without issue*, remainder over; in such case the devisee hath but an estate *for life*, because these words *if he die without issue*, shall be intended a dying without such issue as are expressed in the will; and upon this distinction the case of * *Popbam and Bamfield* was adjudged; for there is a great difference between a devise to *T. S. for life*, and if he die without issue, remainder over, and a devise to *T. S.* (without expressing for what estate) and if he die without issue, remainder over.

* Salk. 236.
pl. 14.
Eq. Caf. Abr.
108. pl. 2.
Fortesc. Rep.
69.
Vern. 79. pl.
167.
Ld. Raym.
says this case
is misreport-
ed in Salk.
Fortesc. Rep.
80.
Fitzgib. 26.

(3.) As to the third point, they all agreed if the sisters took an estate-tail, then they had *cross remainders by implication*; for the subsequent words being, *if both die without issue, or having issue, such issue die without issue*, remainder over; this remainder was not to be executed until both sisters died without issue; they allowed that cross remainders would not rise to more than two by implication; but in this case there were but two sisters, so such remainders may very well rise to them.

This was the opinion of the court upon the first argument, but no judgment was given, for they took time to consider, and ordered a second argument; and afterwards in *Easter-Term 11 Georgii*, it was argued again, and the counsel for the plaintiff in error insisted, that the sisters had only an *estate for life*; and this depended upon such construction as the court should make of the word *issue*, which is no legal word of *limitation*; therefore it cannot be a limitation in a will otherwise than by intendment; and if so, then it must be shewn on the other side that the testator *intended* it as a *limitation*; and in *King and Melling's* case before-mentioned, the argument of the Lord Chief Justice Hale was founded on the intent of the testator; but in * that case it was necessary to give a power to make a jointure, in order to continue the estate-tail undestroyed.

* P. 261.

Now in the principal case there being an express estate devised to the sisters for life, those concomitant clauses, (*viz.*) the giving them power to raise 500 *l.* by digging coal, or selling timber, and restraining them from committing waste, shew that the testator intended they should have an estate for life only; for if he had intended an

estate-

estate-tail, such a power and such a restriction had been impertinent and void; so that taking the whole matter together, it shews that the testator did not want advice in making this will; therefore it ought not to have so liberal a construction, as otherwise it would, if there had been no such clauses to lead the judgment of the court, and to explain the intention of the testator.

A devise to his son for life, & *non aliter*, and to his sons, was adjudged an estate for life only in the son.

So in the case of *Backhouse and Wells* 9 *Annae*, a devise to T. S. for life only, without impeachment of waste; and if he died leaving issue, then to such issue and the Heirs of such issue; this was adjudged an estate for life only.

It is manifest that the words *issue or issues* in a will, may be words either of limitation or of purchase; but in this will, the words being *if the sisters die leaving issue* of their bodies, then in trust for such issue or issues, or else for the survivor or survivors of them; there the word *survivors* sheweth, that the testator intended the words *issue or issues* to be words of purchase, because that word must necessarily relate to the word *issue*, and then the sentence would be thus, (*viz.*) in trust for the issue or issues, and the survivors of them; it could not be in trust for the sisters and the survivors of them, because there were two and no more, and there can be no survivors between two.

Then * *Hilly and Taylor's* case was cited, which is reported in * *Owen* 148. *Cro. Eliz.* by the name of † *Clerke versus Day*, which was thus, † *Cro. Eliz.* (*viz.*) The husband devised the lands to his wife for life; and that 313. pl. 5. if she married after his decease, and had any heirs of her body, then Moor 593. after her decease, that heir should have it, and the heir of the body Rol. Abr. of such heir; and if she died without issue, remainder over: adjudged 832. K. that the wife had only an estate for life, because the words *if she die without issue* being grafted on the word *heir*, do plainly shew that Fitzgib. 24. the word *heir* was used as a designation of the person, and not as a limitation of the estate; and that * immediately upon the death of * P. 262. the wife, the inheritance vested in the heir by purchase.

It was argued for the defendant in error, that the sisters were tenants in common in tail general, because the words *equally to be divided* make a tenancy in common in a will; as for instance; a devise to his three sons and their heirs, and to the longest liver of them, to be equally divided between them, &c. adjudged this last clause made them tenants in common, and here the devise was to his sisters equally between them during their lives; and if they die leaving issue or issues of their bodies, then to such issue or issues, which word *issue* is as proper a word in a will to create an estate-tail, as the words *heirs of the body* are in a deed, and it is the only word in the statute.

Do donis to describe the heirs of the body, (*viz.*) where lands are given to one and the heirs of his body, upon condition that if he die without issue, the lands shall revert to the donor, the donee after

2 Stra. 731.
10 Mod. 181.
Eq. Caf. Abr.
184. pl. 27.
Gilb. Caf. 20,

129.
Fortesc. Rep.
65, 75, 133.
Fitzgib. 12,
22.

* Owen 148.
† Cro. Eliz.
313. pl. 5.
Moor 593.
Rol. Abr.
832. K.
Fitzgib. 24.

Econtra.
Blesset v.
Canwell,
3 Lev. 373.

Westm. 2. c. 1.
anno 13 Ed. 1.

issue had power to disinherit the issue, &c. therefore if the word *issue* is equivalent with the *heirs of the body*, it certainly makes an estate-tail.

And so is * *Sunday's case*, (*viz.*) A devise to his wife for life, and after her decease to his son *William*; and if he marry and hath *issue male*, then his son to have it; and if he hath *no issue male lawfully begotten on his body*, then to *Samuel* in like manner; and if any of his sons or *their heirs males, issue of their bodies*, go about to alien, then the next heir to enjoy it: *William* suffered a common recovery, and declared the uses to himself and his heirs; and adjudged good, because he had an estate-tail, for these words, (*viz.*) *If he hath no issue male*, make an estate-tail, which in this case was farther enforced by the subsequent words, (*viz.*) *If they go about to alien*, which had been impertinent if an *estate for life* had been intended, because in such case they could not alien.

As to the third point, that the plaintiff in error ought to recover for a moiety, because one of the sisters, (*viz.*) *Anne Lunsford* had done no act to prejudice him, and that the sisters did not take by *cross remainders*; for such shall never be raised by *implication*, but where there is an absolute necessity it should be done.

To which it was answered, that the sisters took by *cross remainders* by that clause, (*viz.*) *If both his sisters should die without issue*, &c. now upon the death of one, the whole is vested in the other by way of *cross remainder* by *implication*; and that *Ravenscroft Gifford* shall have nothing by *implication*, till both the sisters are dead without issue, and without doing any thing to bar the remainder.

As to the first and third points, the court was very clear in opinion, as they were upon the first argument; and as to third point they held, that where an estate is limited to the heirs of the body, or to the issue of one upon the decease of another to whom it is expressly devised for life, this is an estate-tail, because the law supervenes the intent of the testator; and this was *King and Melling's case*.

But of late the courts have not gone so far as they did formerly to supervene the intent of testators, as in the case of *Backhouse* and *Wells* in Chancery, in the Lord *Parker's* time, which case differed from that of *King and Melling* but in one word, which was the word *only*; as for instance; *Melling's case* was a devise to one for life, and after his decease, to *the issue of his body* by a second wife; this was adjudged an estate-tail, and *Backhouse's case* was, (*viz.*) A devise to one for life only, and if he die without issue, remainder over; this was adjudged an estate for life, because of the word *only*.

Now in the present case, if the word *issue* is a limitation, it is an entail; but if it is by way of description who shall take, it is but an estate for life; and here the words are, (*viz.*) *If the sisters happen to die, leaving issue or issues of their bodies, then in trust for such issue or issues*; if the testator had rested there, and gone no farther, this had been a plain estate-tail; but he goes farther, and says, or else

Term. St. Trin. to Georgii, 1723.

in trust for the survivor or survivors of them, which words shew, that the testator intended the word *issue* to be a word of purchase, and not of limitation, because the word *survivors* must relate to the word *issue*, for there cannot be any survivors between two, and therefore it could never relate to the *sisters*, and this was what made the doubt.

One of the judges held it an estate only for life; he agreed, that the word *issue* in a will, was a good word either of limitation or purchase, and that it was the intention of the testator which made it either the one or the other; now in this case it seemed, that by the concomitant clauses the testator intended an estate for life to the two sisters, and no larger an estate; and therefore to construe it an estate-tail, would be to control the intention of the said testator.

Two judges of opinion, that it was an estate-tail; the Chief Justice doubted.

* The King versus Pollard.

* P. 264.

THE defendant was found guilty, as accessory to the buying and receiving stolen goods; and now it was moved to set aside the verdict, and for a new trial, because the principal was since tried for the same fact, and (a) acquitted, at the *Old Baily*; and where the principal is not guilty, the accessory cannot be guilty, especially in this case, he being found guilty upon the evidence of the principal.

New trial was never granted in another term after the signing a judgment. Indictment against the accessory, &c.

(a) Indictment for a misdemeanor in receiving stolen goods, knowing them to be stolen; it appeared in evidence that the principal felons had been convicted and executed; whereupon it was objected, that the indictment would not lie, being only given in case the principal felon could not be apprehended; for sect. 6. begins, Provided always that if, &c. which is only a jurisdiction given under those particular circumstances; and of this opinion was Pratt Ch. Just. and the defendant was acquitted. The King v. Wild, Sel. Cas. of Evid. 57.

The statute which relates to this matter was made * 5 Anna, by which it is enacted, That it shall be lawful to prosecute persons buying and receiving stolen goods, knowing them to be stolen, as for a misdemeanor, and to punish them by fine and imprisonment, tho' the principal felon is not before convicted. * 5 Anna, cap. 31. s. 5. 2 Ld. Raym. 1370. 2 Sess. Cas. 10. pl. 17.

And if such principal felon cannot be taken, yet it shall be lawful to prosecute and punish any person knowingly buying goods stolen by such principal, &c. Id. Sect. 6.

Now, by this statute, power is given to prosecute the accessory, but that is where the principal cannot be taken; now here he was not only taken, but appeared and gave evidence against the accessory, therefore the defendant moved for a new trial.

But

Term. S. Trin. 10 Georgii, 1725.

Curia. But it was denied, because the judgment being signed of another (d) It was held, that a new trial could not be moved for at all after the interlocutory judgment was signed; (c) and that there was no difference between a motion in the same term and a motion in another term; and this case was cited as an absolute determination in general, without any such distinction, by Filmer: and Lee Ch. Just. said, his note had no such distinction. MS. Rep. Mich. 12 Geo. 2. B. R. The King v. Armstrong. The rule-book hath been searched, by which it appears that the first motion in this cause was made the same term, and all things ordered to stay; therefore there is no foundation for the above distinction; but the court held, that this motion might be received, even in another term, yet that was upon a supposition, that nothing had been done since verdict; and that signing judgment was the material act, which had made all Attornies General sign the judgment as soon as they could by the rules of the court. 2 Stra. 1102. We presume that the above inaccuracy of Pollard's case, occasioned Mr. Justice Foster to say, it was wretchedly reported; this imputation we hope is now removed.

But the counsel for the defendant insisted upon the granting a new trial; for the same reason, which will warrant a motion in arrest of judgment, will likewise warrant the like motion for a new trial.

But the court demanded of the counsel, whether they could shew a motion was ever made for a new trial, and granted at another term after the signing an interlocutory judgment; and that if they could not shew that such a motion was made and granted, it should not be done in the present case.

To which it was answered, that the counsel on the other side could not shew any precedent where such motion was made and denied; and if such a motion was never made, the merits of the case must be the guide to determine it now; for if there are not any precedents against it, then the same reason which will warrant a motion in arrest of judgment will warrant this motion for a new trial.

But the court denied a new trial, because no precedent could be produced, that it was ever granted in another term after the signing the judgment.

Thereupon it was moved in arrest of judgment, for that the indictment was ill, for the statute which gives a power to prosecute the accessory, though the principal is not before convicted, makes such a prosecution lawful where the principal felon cannot be taken, which are the very words of the statute; now this indictment should have set forth, that the principal could not be taken, which being omitted, it is wrong, and consequently the Judgment should be arrested, the indictment not pursuing the statute, which is the warrant in this case.

Term. S. Trin. 10 Georgii, 1725.

The statute makes the prosecution against the accessory lawful, where the principal felon is not *before* * *convicted*, and not only where he could not *be taken*; so the objection against the indictment was over-ruled; and in *Michaelmas-term* following, the defendant was brought up by *habeas corpus*, and had sentence to stand in the pillory at the *Royal Exchange*, and to be imprisoned for a year.

Econtra.
Attempts have been made under various shapes to prosecute the receiver as for a misdemeanor

while the principal hath been in custody, and amenable but not convicted; but the late Mr. Justice Foster thought that all devices of that kind were utterly illegal; for stat. 1 An. sess. 2. c. 9. in the strict letter of it seemed to be confined to the single case of the non-conviction of the principal, yet the subsequent statute, in order to make them both consistent, must be understood as explanatory of the former, since both acts plainly provide against one and the same mischief; viz. Where the principal absconded, and was not amenable to justice; which the preamble of both shew to have been the mischief in the contemplation of the legislature at the time they were made. Fost. Discourse of Accomplices 373, 374. The opinion said to have been given in this case as reported by Lord Raymond, 2 Ld. Raym. 1370. weigheth very little with Mr. Justice Foster, and if taken in the latitude the words seem to imply (in the opinion of that judge) is not law.

Where (says the same able judge) the principal is amenable, the prosecutor hath in option whether to proceed against the receiver as for felony or misdemeanor, he must proceed as for felony; if he be not amenable, and the prosecutor chooseth to wait for his conviction, he may do so, and then proceed against the receiver as for felony; or at his own pleasure, as for a misdemeanour, without waiting till the principal should be amenable; under these limitations, and these only, as J. Foster conceives, the prosecutor hath an option.

Besides, (continues that judge) the judgment of the court in that case doth not appear to be founded on the opinion supposed to have been then given as the ruling principle, but on a much stronger and more rational motive. The court would not upon motion arrest judgment upon an exception to the indictment which was never taken before, and which must *overset every judgment* that had been given on the statute: this was a solid and rational principle, founded in political justice. For in cases of this kind, *communis error facit jus*. Fost. Disc. on Accompl. 374.

Jenny versus Heale.

UPON a writ of error of a judgment given in the *Common Pleas*, the case was thus: *ff. Anno 1720*, the plaintiff Jenny sold his lands to the defendant, who gave him a bill for the price or value thereof in these words directed to one Pratt, (viz.) Sir, you are to pay to Mr. Jenny so much, &c. out of the money belonging to the Governors and company of Devonshire minors, &c. and the money not being paid, the plaintiff Jenny brought his action in the *Common Pleas* upon this note, as a bill of exchange; and on demurrer the plaintiff had judgment.

Bill of exchange not payable out of any certain fund.
2 Ld. Raym. 1361.
Stra. 591.
2 Ld. Raym. 1482, 1563.
See 10 Mod. 294, 316.
Fortes. Rep. 281. 2 Ld. Raym. 1481, 1362, 1563.

* But now the defendant in the original action brought a writ of error; and it was argued for the plaintiff in the action, that this is a good bill of exchange, for it hath all the qualities of such a bill, that is, it hath three persons, the *drawer*, the *payer*, and the *drawee*; and a set form of words is not necessary in bills of exchange, nor that it must be between merchants; and for this the case of * *Bellasis and Hesther* was cited, where the objection was, that the custom of merchants was not set forth in the declaration, but only that the

* P. 266.
* Lutw. 1589.
Bellasis v. Hesther.

Hard. 445.

defendant and one *Greaveson* were persons *negotiantes* in merchandize, and that *Greaveson* drew a bill on the defendant, payable to the plaintiff *secundum usum mercatorum*; and this was held good; and that to set forth the custom at large would be surplusage, neither is it necessary to shew, that it was between merchants.

* As the drawing or signing every bill of exchange implies a consideration for so doing, so the expressing that the money should be paid out of any certain fund, doth not make it worse; and though it may be objected that this is only a direction to the cashier to pay the money, yet it is still a bill of exchange.

Econtra:

It was said, that this was not a good *bill of Exchange*; for since the bare signing a bill implies a consideration in the person signing (who is the *drawer*) which being contrary to the antient law, the plaintiff ought to shew, that the defendant signed this bill as a Bill of exchange, or as a negotiable bill, for the rise and progress of these bills was admitted and introduced for the ease and accommodation of trade.

If the *governors of the South-Sea company*, or of the *Bank of England*, had signed a note in this form, which is no more than an appointment or direction to their cashier to pay money, this would not bind them; now, the reason why bills of exchange charge the *drawer* is, because he hath some consideration for drawing the bill; but in the present case the drawer had no consideration; besides, it is a contingent bill, it being payable out of the money belonging to the *Devonshire mines*; now, if the cashier had not money sufficient to pay and discharge this note, and for that reason had refused to accept it, certainly he could not be charged for non-acceptance, because he was only to *accept* if he had money belonging to the *Devonshire mines*.

* P. 267.

(a) Show.
Rep. 5.
Fortesc. Rep.
282.
Barnard. K.
B. 88. S. P.

* In all the old bills of exchange, the words *value received* are inserted, though now not (a) necessary; and the want of those words was the only objection insisted on in the court of Common Pleas, on the demurrer to the declaration; and the form of the bill was not so much as mentioned.

Besides it does not appear that this bill did relate to trade, (though that is not necessary) but where the contrary appears, it cannot be a *bill of exchange*.

Curia.

(b) The reason it was held no bill of exchange was because it was no more than a private order to a man's servant.

This (b) note is no more than a direction or appointment to the cashier to pay the money, and doth not answer the necessity of trade; for it is not negotiable as a bill for money, therefore it would be inconvenient to charge the drawer; for if he might be charged on such a note, then any man who gives his (c) steward an order or authority to pay money, might be charged for non-payment.

2 Stra. 762.

(c) Such an order to a steward to pay out of the drawer's rents, is good.

Besides,

Term. S. Trin. 10 Georgii, 1725.

Besides, it is the *substance of the drawer*, which is always considered in *bills of exchange*, for it is that which makes them negotiable; but this new invention of drawing bills on cashiers to pay money out of funds, makes no difference between the best and worst man as to his substance.

It is true, there are three persons named in this note, of which the cashier of the company is one; and this is all, which makes it like a bill of exchange, though there are such bills between two persons, as where they are made payable by themselves, for so are goldsmiths notes: now if this note had been accepted by the cashier, and he had died without paying the money, certainly his executors could not be charged.

It is true custom hath carried bills of exchange a great way, but never so far as to make them payable out of any particular fund; and for these reasons the judgment in the Common Pleas was reversed.

The King *versus* Ludlam, Chamberlain of London.

UPON a *mandamus* to admit George Warren to his freedom of the city of London; he having served an apprenticeship to the warden of the company of merchant-tailors, the chamberlain made a return of the custom of London to make by-laws, and that a by-law was made the 19th of October 6 W. & M. "That no person using the trade of a joyner should be made free of any other company but that of the joyners, with an express prohibition to the chamberlain to that effect: and that every person who had served an apprenticeship to a joyner should upon notice take up his freedom, with a penalty of 10 l. if he is admitted of any other company." That this man has used the trade of a joyner: * wherefore he was never admitted.

By-law, whether good and well returned.
Stra. 675.
Bur. Rep. 16.

* P. 268.

The question was, whether this is a good by-law or not; and it was argued (against the return) that it was not, because the city of London for many ages past hath been supplied with all their superior officers out of the twelve great companies, of which this of the merchant-tailors is one; and that Warren is free of that company, and therefore he shall not be compelled to be free of any other.

There are but two ways of being free, (*i. e.*) By birth and by acquisition, for every freeman's child is free of the same company of which his father was free; and if such child should be of another trade, certainly he would not be obliged to purchase his freedom in another company.

Besides this return is ill, for it is that he who exercises the trade of a joyner in London, must take his freedom in the company of joyners, if summoned for that purpose; and it is not set forth that Warren was summoned.

On

Term. S. Trin. 10 Georgii, 1725.

Econtra.

On the other side it was argued that this was a good by-law, and well returned; that it was a by-law founded upon a custom, and confirmed by acts of parliament, and made by a great number of citizens (in common counsel assembled) to prevent abuses and frauds in trade.

And as these guilds and fraternities have obtained this freedom as an encouragement of trade, so no custom should be established which is detrimental to it, as this custom would be, that a man who is free of one company, shall not be compelled to be free of another more suitable to his trade and employment.

The reply.

* P. 269.

It was further argued against this by-law, that though all the customs of the city of *London* are confirmed by act, yet * when ever an unreasonable custom is returned, it is always adjudged void; now if *Warren's* being free of the *merchant taylor's* company did screen him or his work from the inspection or inquiry of the *joyner's* company, it might be reasonable that he should be admitted of that company; but when it doth not, there can be no manner of inconvenience of taking his freedom in another company, and not in this; and so is the case of *Robinson* and *Groscourt*, which hath been already cited and unanswered. It was thus:

Robinson v.
Groscourt,
5 Mod. 104.

¶ An action of debt was brought for 10*l.* forfeited upon the breach of a by-law, which was; that every person exercising the occupation of *musick* and *dancing* within the city of *London*, who shall have a privilege to be made free by *patrimony*, shall at the next court of assistants of the company of *musicians* after notice, accept and take the freedom of the said company, under the penalty of 10*l.* this was adjudged a void by-law, for it hath no custom to support it; it is true the custom was laid to be, that whoever is free of the city must be free of some company; but that custom doth not oblige a man to be of any particular company, but leaves it at large to be free of some company; now in this case, though *Groscourt* the defendant should be intitled by birth, or by apprenticeship, to be free of a company, yet he must likewise be free of the company of *musicians*; so that this by-law exceeds the custom, and for that reason it was held void; and so should this, and for the same reason.

Curia.

The common council have power to make any reasonable by-laws; and this in the principal case seems to be such; for it was made to prevent the frauds in trade, by subjecting a man to the inspection of those who understand the same trade, (*viz.*) The trade of a *joyner*, which the company of *merchant taylor's* do not; but the only question which admits any doubt is, if a man who is free of the *merchant taylor's* company, and exercises the trade of a *joyner*, may demand his freedom in the *joyner's* company; for if he may not demand it, then this by-law is manifestly injurious to him, because it takes away his right of freedom in one company, and gives him no right to his freedom in another company; but by *Fortescue J.* certainly a by-law which makes it penal for a man to exercise any other trade,

Term. S. Trin. 10 Georgii, 1725.

trade; entitles him to his freedom in the company of the same trade; and it is a reasonable by-law which hinders men from exercising such trades, and being free of such companies, who * have no knowledge in those trades; and (by *Raymond J.*) the case in the 5th Mod. differs from this, because in that case there was no company of *dancing-masters*, of which the defendant might be made free; and besides, this case was never determined, but was adjourned by reason of another exception to the proceedings. P. 270.

Now this by-law being agreeable to the constitution of the city, and not restraining trade, but rather regulating it by subjecting several artificers to be under the inspection of others, who understand the same trade, which cannot be better done, than by compelling them to take their freedom in a company of that trade in which they are employed; therefore this was adjudged a reasonable by-law.

The freedom of the city cannot be taken from a man, provided, he will take his freedom in a proper company; and if that company will not admit him, the court will grant a *mandamus* to compel them; but on this return it appears, that every man who exercises the trade of a *joyner*, &c. within the city of *London*, ought to be free of the company of *joyners*; but it doth not shew that the defendant did *exercise that trade in the city*, &c. but that he did exercise the trade of a *joyner* generally, without saying where, and then it might be at *York* or any where else; but it is his exercising it within the city of *London* which gives them jurisdiction; and for this cause it was adjourned.

Ashton versus Blagrave.

IN an action on the case for scandalous words spoken of a *Justice of Peace*, there being a *colloquium* laid of the plaintiff, and of his office of Justice of the peace, the defendant spoke the following words, (*viz.*) *He (meaning the plaintiff) is a rascal, a villain and a liar*; upon not guilty pleaded the plaintiff had a verdict; and upon a motion in arrest of judgment, a rule was made that the plaintiff should shew cause, &c. and now it was moved for judgment, that these words were actionable, because they convey an idea too mean, and very much unbecoming the office of a justice of peace, and the meaning of words is always to be taken according to common intendment; therefore the calling a man *daffi-down-dilly* and *ambidexter* was held actionable, though those words import no crime in themselves; but in common acceptation are applied to some crimes. 2 Ld. Raym. 1369. Stra. 617. Fortesc. Rep. 206.

* The signification of words is various; as for instance; it is now actionable to call a man *jacobite* or *papist*, but it was not so in a late reign, therefore words must be construed to be scandalous, P. 271.

Term. S. Trm. 10 Georgii, 1725.

or not, according to the common acceptation when they are spoken; but the words in the principal case did always import a meanness and scandal of the person of whom they were spoken; and there is a difference between speaking of a *justice of the peace*, and speaking of him in his office, as specially laid in this declaration.

Econtra.

It was said on the other side, that these words are so foreign to the office of a justice of the peace, that tho' he is named, they cannot imply any scandal to his office, for none of them alone are actionable; the word *rascal* is not, nor the word *villain*, unless some other words are added, (*viz.*) *Stay the villain, or seize the villain*; neither is the word *liar* actionable; and if they are not actionable alone, they are not so when taken altogether; and the rather, because they are not of any certain signification.

Hob. 117.

4 Rep. 16.

* 4 Rep. 13.

Moor 141.

† 1 Lev. 52.

Sid. 67. Prill

v. Feild.

It is true, it is actionable to say of a *justice of the peace*, that he is a *coverer of thieves*, because this is against his oath as justice of the peace; but it is otherwise for calling him a *rogue* or *varlet*; and so it is to say he is a *vermin in the commonwealth*; neither is it actionable to call him a *fool*, an *ass*, a *coxcomb*, a *buffle-head justice*; so the words in this case are not actionable.

To which it was answered, that a justice of the peace hath a double capacity, and that where it doth not appear that the words were spoken of him as a justice, they may not bear an action, but where they were spoken of him relating to his office, they are actionable.

Ceria.

2 Ld. Raym.

369, 370.

Sira. 618.

Fortesc. Rep.

207.

26th Nov. Mich. term 11 Geo. 1. Lord Chief justice Pratt, delivered the resolution of the court, *viz.* That the words were actionable, they being laid to have been spoken of the plaintiff in the execution of his office, and so found: so that it is the same as if the defendant had said, that the plaintiff is a villain in the execution of his office, a rascal in the execution of his office: the words *rascal* and *villain*, spoken of a justice of peace, where a *colloquium* was laid of his office, import a scandal; for admitting those words to be of an uncertain signification, yet they carry with them great scandal, and in common understanding import a vile and base man, and that he is so *in executione officii*, and are a great imputation against the plaintiff's integrity and behaviour in that office, but to say he is a liar in the execution of his office, is as much as to say, the justice of peace acts partially and corruptly in the execution of his office, he must give false judgments, knowing them to be false; for, it cannot be a lie, unless he knows it to be false; and tho' it were a right judgment, and he thought it to be wrong, and so intended it, it would be partiality and corruption; and the scripture says, that a thief is better than a man accustomed to lying; and therefore none of the cases cited come up to this case; so taken altogether, they are scandalous words; and the plaintiff had judgment.

See Sir John Hawles's Remarks on Fitz. Harris's trial, fol. 9.

* Reynolds versus Clerk. Tuesday 16 June. * P. 272.

TRESPASS *vi & armis* against the defendant for entring into the plaintiff's house and yard, and fixing a spout on his own house, for conveying the rain water from his house into the said yard, *ratione cuius aqua currebat in stabulum* of the plaintiff, & *occasione* inde rotted the timber, &c. whereas before the water dropped from the eaves of the defendant's house into the said yard, and then did no damage; *ad damnum*, &c.

Where an action on the case, and not an action of trespass, is the proper action. Stra. 634. 2 Ld. Raym. 1399. Fortes. Rep. 212.

The defendant pleaded not guilty as to all, but to entring the house and yard and fixing the spout on his own house; and as to that he justified, for that T. S. being seised in fee as well of the plaintiff's as of the defendant's house, which was adjoining to the yard belonging to the plaintiff's house, by indenture conveyed the house and yard to the plaintiff, with an exception in the deed of the free use of the yard, &c. to the said T. S. and to all the tenants and occupiers of the defendant's house, which house was afterwards conveyed to the defendant; and averred that the spout so fixed was necessary for the use of the defendant's house, and so justified by virtue of that exception.

And upon a demurrer to this plea it was insisted for the plaintiff, that this justification was not good, because the spout was a nuisance to him; and tho' T. S. might justify the fixing it to one house, when both were in his possession, yet when both were sold to different persons, * one of them cannot justify for a nuisance done to the other; and in this case the defendant had neither an express or an implied power to set up any spout, especially when it would be a nuisance to the plaintiff.

* Hob. 131. 11 H. 7. 25. Poph. 166. 172. Dav. 5. Dy. 295. pl. 19.

The use of this yard reserved to the defendant, is no more than an *easement* to his house, and not to be used to any other purpose; and the nature of a *nuisance* is such, that if it be of necessity, (*i. e.*) If it is necessary or beneficial to him who made it, and another buys the land in which the nuisance was made, in such case the nuisance is purged; and if afterwards the lands come into different hands, it is not abatable; but if it is an unnecessary nuisance, it is only a suspension thereof when in one hand, and afterwards coming into different hands, it is abatable.

But there are some privileges so very necessary as not to be extinguished by *unity of possession*, as *paths* to a mill, &c. for they shall revive as soon as the tenements come to different * hands again; now, in this case the defendant having erected this nuisance after the tenements came to different hands, there can be no colour for him to justify.

* P. 273.

The

Term. S. Trin. 10 Georgii, 1725.

Econ. ra.

The counsel for the defendant took no notice of the objection made on the other side, but insisted, that the plaintiff was mistaken in his action, because trespass would not lie for fixing a spout on his own house; but that if the plaintiff had any damage thereby, he ought to bring an action on the case to recover what he was damaged, for he had a licence to enter the yard, and could not be a trespasser for entering and fixing the spout on his own house.

8 Co 146.
a. b.

Besides, the defendant hath averred in this plea, that the fixing this spout is for the necessary use of his house, which the plaintiff hath confessed by the demurrer; therefore when he justified the entering into the yard, the consequence thereof cannot be a trespass.

“ Secondly; the consequential damage in rotting the timber, is
“ a description and part of the original trespass; for whatever comes
“ under a *virtute cuius*, or a *per quod*, or *ratione inde*, cannot be
“ traversed, being no new charge, only a farther description of the
“ former charge. 8 Co. 10. a. Vent. 54, 340. T. Jo. 110. the plea
“ therefore is good, though it does not particularly answer the rott-
“ ing of the foundation, since that is only aggravation.

The reply for
the plaintiff.

It is now insisted on by the defendant, that the plaintiff hath mistaken his action, but not the defendant's innocence, and that an action on the case is the proper action for the plaintiff, which is very true, and so is a *quod permittat*; but yet trespass is likewise a proper action; for it cannot be denied, but that the freehold and inheritance of this yard is in the plaintiff, and that the defendant hath only the bare use of it, and by misusing it he is a trespasser.

It is true likewise, that the defendant had licence to enter the yard, but every licence must have a reasonable construction; for can it ever be intended, that because he had leave to enter the yard, and had the use thereof, that he might justify the throwing down the plaintiff's house?

Curia.

Upon the first arguing this case, the Chief Justice said this licence was granted by special words, so could not be so extensive as otherwise it would have been; for the case is no more than a grant of the house and yard; and to except the yard would be void as to the freehold; therefore the exception must be intended to some particular purpose, as to the use thereof, to walk in, or to go to the pump, and in such case he is to do no damage to the freehold; and if this licence is in any manner misused, to the prejudice of him who hath the freehold; he who misuseth it is a trespasser, as if he dig up the yard, &c. but the use which was made of it in this case, was to enter and fix a spout to his own house; now, tho' the original act was lawful, as done to his own house, yet he may be a trespasser, when the immediate consequence of such an act is
* P. 274. injurious to his neighbour; for * suppose a man hath a *water-
course* running through his ground, and his neighbour diverts it, this

is no trespass, but if by diverting it, he turned it on his neighbour's house, it would be a trespass. The *per quod* is only the description of the trespass.

For which reason the Chief Justice and another judge held this action of trespass was a proper action.

Two other judges were of a contrary opinion.

“ *Fortescue* Justice: The defendant ought to have used the house as when both houses were in the possession of one man, then the water dropped from the eaves, and no spout was fixed; so that the fixing the spout is a nuisance to the plaintiff; I do not think the *per quod* to be merely a further description of the trespass, because it was fully described before. The entry into the yard is no trespass: a man having the use of a yard, may make all the common ordinary uses of it. An action of trespass is a possessory action, and must be founded on some act, which disturbs the possession; this is not like the case of throwing filth, rubbish, &c. into a man's yard. *Trespass* is where an act is done immediately to the prejudice of another: and an action on the case is founded on an act which mediately tends to the damage of another; and this seems the true difference between an action of trespass and case, *utere tuo ut alienum non laedas*. If one shooting at a bird destroys another's decoy, an action on the case only lies. In this case there is no immediate trespass done; he might enter into the yard; he might fix a spout to his own house, and for the consequent mediate damage arising from thence, an action on the case would have been the plaintiff's remedy.

Caf. Temp.
Holt 16.
11 Mod. 73.
pl. 5. 130.
pl. 10.
2 Kel. 273.
pl. 210. S.P.

“ *Raymond* Justice: The fixing the spout was a lawful act; but since its consequence is a nuisance to the plaintiff, the defendant is answerable for it; the only question is, whether an action on the case or trespass *vi & armis* ought to have been brought: A distinction hath been made between an act mediately or immediately prejudicing another. I remember the case of diverting a water-course mentioned by the Chief Justice, it was a west country case, *Courtney (a) v. Collett*. The plaintiff brought an action of trespass *vi & armis*, for that the defendant having a water-course running through his land diverted the same, *per quod* the plaintiff's grounds were over-flowed; after Not guilty and verdict for the plaintiff, it was moved in arrest of judgment and insisted on, that an action upon the case was the proper remedy, since the original act of diverting the water-course being in his own land was lawful: but the court held the action of trespass maintainable, since the *per quod* could not be looked upon

(a) Lee, who afterwards argued for the plaintiff, cited this case as follows, and said he had it from serjeant Carthew's notes. Hil. 9 W. 3. Courtney v. Collett. Tres-

pass vi & armis by Sir William Courtney quare clausum fregit, & in solo piscariam cepit; necnon de eo quod fregit & asportavit the floodgates, and opened the sluices, per quod the water came upon the plaintiff's pool. After a verdict for the plaintiff, Gould serjeant moved in arrest of judgment, because the latter part of the declaration charged a fact proper only for an action upon the case. But the court — An action of trespass maintainable for the latter facts as well as for the first.

Term. S. Trin. 10 Georgii, 1725.

(a) Raymond, "only as a description of the trespass, (a) and accordingly the plaintiff had his judgment: which case is a full proof, that an action of trespass may be brought where the original act was no trespass; for diverting the water course was not a trespass immediately prejudicial to the plaintiff.
when he afterwards delivered the resolution of the court on the second argument, being then Ch. Just. gave a different account of this case from what he does here; and declared that the above account given of it from his memory was mistaken. Stra. 635.

"Pratt Ch. Just. The better opinion then has been, that where ever a damage is done, the party damaged is at liberty to bring either an action of trespass or action on the case."

"Fortescue Just. It seems odd to make a man a trespasser, for doing a lawful act within his own grounds.

"Raymond Just. If the act stops there, it is odd, not else.

Adjournatur.

Afterwards in *Trinity* term 11 Geo. 1. this point was argued again, the question being, if trespass lies for entering his yard, and setting a spout on his own house; and it was argued, that it did not, but that an action on the case was the proper remedy; it was admitted, that where the original act is a wrong actually done, in such case trespass lies, but where the original act was lawful, and consequential damages ensue, there an action on the case is the proper remedy.

The complaint against the defendant is for a nonfeasance, (*viz.*) For that he did not take care that this spout should not damnify the plaintiff's house; and it is certain that trespass will not lie for a nonfeasance; if the defendant had undertaken to cure the plaintiff's horse, and by his negligence the horse had died, yet trespass would not lie against him, tho' the horse was the property of another man; but in this case the house was his own.

Edwards v. Hallender, Poph. 46. Cro. Eliz. 285. pl. 3. S. C. 2 Leon. 93. pl. 116. S. C.

* P. 275.

Econtra for the plaintiff.

Preston v. Mercer, Hardres 60.

The case of *Edwards* and *Hallender* is full in point, which was thus: the plaintiff had a cellar, and the defendant had a warehouse over that cellar, on which he laid so great a burthen, that the floor broke and fell into the cellar and spoiled three butts of wine: adjudged, that an action on the case, and not an action of trespass lay against the defendant.

* It was argued for the plaintiff that *trespass* is the proper action; for though it was lawful for the defendant to fix the spout on his own house, yet he ought not to do it in such a manner, so as immediately to trespass his neighbour; like the case of *Preston* versus *Mercer*, which was trespass *vi & armis* for causing stinking water in his yard to run to the walls of the plaintiff's house, and piercing them, so that it run into his cellar; after a verdict for the plaintiff, it was moved in arrest of judgment that *trespass vi & armis* would not lie against the defendant, because a man cannot be a trespasser with force and arms in his own ground, he ought to bring an action on the case; but judgment was given for the plaintiff.

To

Term. S. Trin. 10 Georgii, 1725.

To which it was answered, that the original act was a wrong done, (*viz.*) by causing stinking water to run to the walls of the plaintiff's house; which differs from the principal case, and so is no authority for the plaintiff.

" *Raymond* Ch. Just. The case of *Preslon v. Mercer* in *Hardr.* 2 Ld. Raym.

" 61. was a proper action of trespass, for the declaration charges 1403.

" that the defendant did *make* the water to run, which is an imme-

" diate tort. In the case of *Courtney v. Collett* there was matter laid Ld. Raym.

" proper for an action of trespass; the question arose on what fol- 272.

" lowed the *necnon*, whether it should be taken as aggravation of

" the former trespass, or as the description of a new one: and by

" my notes it does not appear that judgment * was ever given. * At last judg-

" The bounds of all actions ought to be preserved; the right rule ment was for

" and distinction is, that where the act itself is unlawful and pre- the plaintiff,

" judicial, trespass must be brought: if the act is lawful, and only who had

" by consequence is a damage to the plaintiff, he must bring case, brought tref- 635.

" *Mich. 8 Ann. Levridge v. Boscall*; trespass on the case, the plain- 2 Ld. Raym.

" tiff was possessed of a barn and a river adjoining; that the defen- 1402.

" dant dug two trenches, and thereby diverted the water of the ri- Stra. 636.

" ver; after verdict *Pratt* serjeant moved in arrest of judgment, be-

" cause the action ought to have been trespass *vi & armis*; but the

" plaintiff had his judgment, for the declaration not specifying in

" whose ground the defendant dug the trenches, it shall be pre-

" sumed to be in his own ground, and then the first act being law-

" ful was no *tort* to the plaintiff; and the consequential damage

" only affected the plaintiff, which was proper for trespass on the

" case. I think this action is not maintainable.

" *Powys* justice of the same opinion.

" *Fortescue* Justice: Trespass upon the case, and trespass *vi &*

" *armis*, are different in name and in their nature; for the one

" is called an action for a nuisance, and the other are called *actiones*

" *injuriarum*; the one must be brought for a wrong done imme-

" diately to the person or his possession, the other for a consequen-

" tial damage. This action is brought for a wrong done to the

" possession, but not immediately; because the defendant had a

" right to come into the yard, and to fix a spout to his own house.

" If logs are laid in the highway by which any person is hurt, he Stra. 636,

" must bring case: but if the hurt is received by logs thrown at the

" person, he must bring trespass *vi & armis*: case must be brought

" for making sluices in a man's own ground, by which my land

" is overflowed. *Rol. Abr.* 104. The objection to *Courtney v. Col-*

" *lett* was, that trespass *vi et armis* and trespass on the case could

" not be joined in one declaration; no judgment was given that I

" can find in my notes; in some cases I think those two actions

" might be joined. It not appearing in that case whose the flood-

" gates were, they might be the defendant's own: and then tref-

" pass on the case ought to be brought. In this case the fixing

" the

" the spout was lawful; so was the entring the yard by virtue of
 " the reservation which gives a right to use the yard as well as the
 " pump, &c.

Reynolds justice of the same opinion.

Judgment for the defendant.

Waddy *versus* Newton.

Where the
 acres men-
 tioned in a
 fine or com-
 mon recovery
 shall be taken
 by computa-
 tion, and not
 by the statute
 de terris men-
 surandis.

* P. 276.

For the plain-
 tiff.

Thynn v.
 Thynn, Vent.
 51. S. C.
 Lev. 27. S. C.
 Sid. 190. S. C.
 Mod. 25. S. C.

2 Mod. 239.
 S. C.

* 2 Inst. 42.

Econtra for
 the defendant.

UPON a special verdict in ejectment, the case was thus:

§. Tenants in tail covenanted to levy a fine, and suffer a common recovery of the lands now in question, and of a fishery; and accordingly levied the fine thereof, by the name of 120 acres of land in *Stockwell-hall*, in the county of, &c. and of 10 acres *aqua cooperta*; and declared the use thereof to himself and his heirs.

* But there being many more than 140 acres *statute measure*, the defendant who was heir in tail would contest the right to all above those 140 acres; and thereupon the plaintiff brought an ejectment, and suggested that the whole estate was computed to be 140 acres by the common computation in the country, &c. and upon Not guilty pleaded the jury found a special verdict, (*viz.*) they found the fine was levied, and the recovery was suffered by the name of 120 acres of land, and of 10 acres *aqua cooperta*; and that the whole estate entailed was computed in the country to be 140 acres of land.

It was insisted for the plaintiff, that all the entailed lands were comprised in this fine, by the name of 140 acres of land; and this by the intent of the tenant in tail who levied the fine; that computations are to be ascertained by a jury, according to how much it is reputed to be in the country, where computations are made, and that they are tied down to the very country where the things are transacted; therefore where an *habere facias possessionem* is directed to the sheriff to put a man in possession of 20 acres, he must deliver 20 acres to him according to the usage of the country where the lands lie.

So where tenant in tail of the manor of *Larvington*, and of two closes reputed parcel thereof, levied a fine, and suffered a recovery of the manor, *with the appurtenances*; now tho' the two closes were only parcel of the manor in reputation, yet they were adjudged to pass, because it was intended by the parties that they should pass.

The fishery likewise passes by the name of 10 acres *aqua cooperta*; for it is demandable by that name in a *præcipe*, which is a real action, and so it is in an * assise; and if a real action will lie for it, certainly an ejectment will.

It is not pretended that this computation is the common way of measure of lands by the custom of the county or hundred, but only by the custom of *Stockwell-hall*, in the county of, &c. and it will

be very difficult to know how far that extends; so there being no manner of certainty to fix the custom, the plaintiff can never get over the statute *† de mensurandis terris*; but that the court will *† 34 E. 1.* judge of the number of acres comprised in this fine and recovery, according to that statute, as a certain rule to direct their judgment.

* Now by that statute, an acre of land containing ten perches in length, must be sixteen perches in breadth, and so on; therefore these 140 acres comprised in this fine, must be according to that measure, and not left to an incertain computation; and there is a difference between a manor which is fixed to no certain measure, and a quantity of acres where the measure is ascertained by the statute. * P. 277.

It is true, if it was the custom of the county or of the hundred, so as it was limited or fixed to a certain place; this method of computation might be good; as the acres in *Cornwall*, or a perch in *Staffordshire*; because the publick usage of the county gives it a sanction; and there are some *†* law books which prove that the measure in those counties is different from all other places in *Eng-land*; and so are the prices of the things measured. *† Crompt. Junif. 222.*

But in the present case, the acres, if taken by computation, are two fifths larger than the common or statute measure, without confirming such computation to any certain place; and in all the cases wherein it is mentioned, what passed by suffering a recovery of a manor in reputation, it is alledged in the deed, that the covenantor is to suffer a recovery of a reputed manor; but it is not set forth in this deed, that the covenantor was to suffer a common recovery of so many acres in reputation; but only of 140 acres generally.

Besides there is a difference between a fine levied and a recovery suffered, in pursuance of a contract for a *valuable consideration*, and a voluntary fine and recovery as this is; for in the one case, the prior agreement governs the whole; but where there is no such agreement, the ordinary course of law is to be the guide, and no strained construction shall be deduced from the intention of the parties.

And it is to be observed, that the statute *de terris mensurandis* was made on purpose to ascertain the fine due to the King, by alienation of lands by fines, and therefore such a loose computation of the number of acres shall not avoid the design of this statute; and if so, then where a man covenants to levy a fine of 500 acres of land, certainly it must be intended *statute acres*.

As to the *fishery*, the plaintiff hath no colour to have judgment, because an ejectment will not lie of a *fishery*, nor in any case but where there may be an entry and expulsion; and that cannot be of a fishery, especially in this case where * it was of a fishery in the river Tyne, which cannot pass by the name of so many acres *agua cooperta*, because it is not like a pond where the very soil is the property of another; but this is only a freedom to fish in that river. * P. 278.

Term. S. Trin. 10 Georgii, 1725.

Curia.

It is admitted by the counsel for the defendant, that if this fine had been levied, and recovery suffered, in pursuance of a former agreement or covenant for a *valuable consideration*; and if it had appeared to be the intent of the parties to pass the whole estate by the name of 140 acres; in such case the whole would pass.

Now here the jury hath found that the whole estate entailed, was computed in the county to be 140 acres; and it will be difficult to apprehend a difference between a covenant for a valuable consideration, and a voluntary covenant; for it cannot reasonably be said, that the same words shall pass all the lands in one case, and shall not pass the whole in the other case, especially when the tenant had it in his power of passing it as he pleased.

* Cro. Car.
492. pl. 17.
Herbert v.
Langbane.

It will not lie
de piscaria in
such a river,
because it is
only a profit
apprendre;
but it will lie
de terra aqua
cooperta.

But they held that an ejectment would not lie of a * fishery; so the defendant must have judgment as to that matter; but because the Chief Justice who tried this cause, did believe that the defendant was surprised by the finding of the jury, that the whole estate-tail was computed in the country to be 140 acres; they would not tie him down to this verdict, but admit him to bring a new ejectment to try the truth of that matter, and that they would consider of the judgment till next term; but recommended it to the parties to agree in the mean time.

Serle *versus* Barrington, Thursday 18 June.

2 Ld. Raym.
1370.
2 Stra. 826.

THIS was an action of debt brought by an executrix upon an old bond for money due to the intestate; and upon oyer of the bond, and the condition thereof, it appeared to be dated *anno 9 Willi.* (which was thirty-five years past) and thereupon the defendant pleaded *solvit ad diem*; upon which they were at issue; and at the trial the defendant offered to prove the issue by presumption, (*i. e.*) this being a bond of more than twenty years standing, and no interest being paid in all that time, it must be presumed that the principal was paid on the day.

* P. 279.

Now to encounter this presumption, the plaintiff offered to give another presumption in evidence, and that was an indorsement of the payment of interest for one year after the bond was nine years old, which indorsement was written with the intestate's own hand; and whether that should be given in evidence at the trial, was the question. It was proved that after the death of the testator, this bond was found amongst his papers, and that the testator was esteemed an honest man. No evidence was given to prove whether the indorsement was made by the obligee or obligor, or that this indorsement was ever seen by any person, upon which the plaintiff was nonprossed; and the Chief Justice ordered, that this matter should be referred by way of a case stated for the opinion of the court.

Term. S. Trin. 10 Georgii, 1725.

And now it was argued for the plaintiff, that tho' it is a general rule, no man can be evidence in his own cause, yet where the necessity of the case requires it, he shall be an evidence, as on the statute of *Winton*, where the person robbed is allowed to be evidence for himself to prove the robbery; so where a servant is admitted to be evidence to prove the delivery of his master's goods to a carrier, tho' at the same time he swears to discharge himself; and this is from the necessity in such cases, because probably there may be no other evidence to prove those facts.

Besides, in this case, the indorsement being of the intestate's handwriting should rather be given in evidence, because it is to prove money paid in discharge of what was owing by the defendant; and it would be very hard to require any other proof, because none can be had of such transactions, but his own indorsement; and the allowing it to be given in evidence is not an admitting it to be a sufficient proof for the jury to find for the plaintiff, but to let it have its due weight, that they may consider upon the whole merits.

It was insisted for the defendant, that this should not be given ^{Econtra.} in evidence, for if it should, it will be in the power of any man who can get an old bond into his possession, to charge the obligor again (after the money paid) by making such an indorsement; and it would be as unreasonable and as inconvenient to put the defendant to prove the money paid after so long a time of acquiescence, as it would be to put * the plaintiff to prove an actual payment of * P. 280. the interest thus indorsed.

Fortescue and *Raymond* were of opinion, that this case ought to ^{Curia.} be judicially brought into court by demurrer, or by some other proper method; for the plaintiff being nonsuited, there is no cause now in court; and so whatever judgment is given will be extrajudicial; and because such judgment will not determine the case, they at first were unwilling to give any judgment.

It is true, the indorsement made by the obligee charges himself, but if the obligor should get the bond into his possession, he may make as many indorsements as he will, and by that means wrong the obligee of all the interest; and they were of opinion, that this indorsement might be admitted in evidence; for it is the daily practice to make such indorsements on bonds, and generally at the request of the obligor; and this is the best and surest evidence of the payment of the money, because acquittances and notes may be lost, whereas indorsements will continue as so many brands on the bond into whose hands soever it falls, as long as the original *lien* which creates the charge shall continue.

Pratt Ch. Just. said, That at the trial he seemed to be of opinion that the indorsement ought not to be received as evidence; because it would leave too great a power in an obligee (in whose custody the bond always remains) to make such indorsements

Term. S. Trin. 10 Georgii, 1725.

“ dorsements whenever he thinks proper: they may be made at
“ any time, and so no bond can ever be presumed satisfied.
“ *Cur* seemed clear of opinion, that the nonprofs could not be
“ set aside; yet adjudged to search precedents.

Manning *versus* Turner.

Judgment a-
gainst the bail
set aside upon
the surrender
of the prin-
cipal.

IT was moved to set aside a judgment against the bail, for that the principal surrendered himself the 2d day of *May*, and seven days afterwards gave notice thereof to the attorney for the plaintiff, that he had surrendered himself on that day before *Justice Tracy*, and two days afterwards he gave notice that he had surrendered himself before *Justice Powys*, and all this before the return of the second *scire facias*.

Econtra:

It was said on the other side, that though notice was given to the attorney, yet by the express rule of this court, the bail are not discharged until the bail-piece is marked, which was not done until after the return of the second *scire facias*; * it is true, there is an *exoneretur* entered now, but that was after the signing the judgment.

* P. 281.

To which it was replied, that admitting the fact to be as before-mentioned, yet the judgment ought to be set aside, because the plaintiff's attorney took the bail-piece from the judge's chamber, but did not leave it with the proper officer; but as soon as it was left with him, the attorney for the defendant entered an *exoneretur*, so that it was the plaintiff's fault that it was not entered sooner.

This matter being referred to the Master, he reported, that the principal surrendered himself on the second day of *May*, and notice was given to the plaintiff's attorney, that the surrender was before *Justice Tracy* on the seventh day of *May*, and two days afterwards, that it was before *Justice Powys*, and the bail-piece was discharged on the fourth of the same month, and that the second *scire facias* was returnable on the ninth day of *May*, and that the plaintiff's attorney took the bail-piece from the judge's chamber, and kept it for a considerable time; and that there was not fifteen days between the teste and return of the second *scire facias*; neither was it four days in the office; and upon this report the judgment was set aside.

Wild *versus* Harding.

A Rule was made to discharge the bail, on a pretence that the principal had surrendered himself before the return of the second *scire facias* against the bail; and now it was moved to discharge that rule for two reasons, (*viz.*) For that if there was any such surrender, the plaintiff's attorney had no notice of it; and if there had been notice, the defendant's attorney should have brought the bail-piece before the Master to have it discharged, otherwise it is no surrender by the express rule of this court; and neither of these things being done, the surrender is not regular, and therefore the bail are not discharged, there being no *exoneretur* entered on the bail-piece, not that the plaintiff owned the surrender was made in time.

Bail are not discharged upon the surrender of the principal, unless an *exoneretur* is entered on the bail-piece.

It is the practice of the court, that the bail are not discharged without entering an *exoneretur* on the bail-piece, on notice given of the surrender; but if the defendants did not give notice, it is an irregularity which will not be supplied by the court without paying costs; but if the bail surrendered * the principal fairly, tho' * P. 282. not strictly regular, they ought to be favoured, and are indulged by the court to surrender him at any time before the return of the second *scire facias*; now the question in this case was, whether the principal did surrender himself before such return, and the best evidence of that matter is the bail-piece; but if he did surrender himself, and gave notice, he ought to pay costs until the bail-piece was marked; for he is to take notice of that, (*viz.*) Of the *exoneretur*, and not of what the attorney for the plaintiff told him.

Goddard *versus* Gilman.

THE plaintiff brought an action of debt in London, and had judgment, and sued out a *feri facias* directed to the sheriff, without a *testatum feri facias* into London, by virtue whereof the defendant's goods were taken in execution in Middlesex; and because this was done by an original *feri facias* without a *testatum*, the execution was set aside as irregular.

Where a *fi. fa.* without a *testatum* is not good.

And now the plaintiff moved, that he having a judgment with a release of errors, that the goods might remain in the sheriff's hands, and not be delivered to the defendant, who was a poor man, for by that means the plaintiff would lose his debt.

When the execution is set aside (as it was in this case) the goods taken must be returned, because there can be no colour for the sheriff to detain them.

Curia.

The like rule was made in *Michaelmas-term* following, in the case of *White versus Cornwall*, where an action was laid in one county, and the plaintiff had judgment, and took out a *fieri facias* directed to a sheriff of another county, without a *testatum*, &c. afterwards, the plaintiff's attorney perceiving this mistake, sued out a *testatum fieri facias* into that county; but before it came to the sheriff he had executed the first writ, and afterwards he executed the other writ; but the execution was set aside, because the first writ being executed, the sheriff could not regularly execute the other.

* P. 283.

* *Fry versus Carne.*

Words where
actionable.

IN an action of the case for these scandalous words, (*viz.*) *Fry* (the plaintiff) *had the Pretender's picture in his room, and I saw him drink his health*, and he said that he (the Pretender) *had a right to the crown*; it was moved in arrest of judgment, that these words were not actionable; but the court would not suffer the defendant's counsel to insist on it, for that they all held the words were actionable, and so the plaintiff had his judgment.

The King versus Sir Charles Holloway.

Information
against a
school-boy
for assaulting
his master.

THE court was moved for leave to file an information against the defendant, who was about 15 years old, and a scholar at *Winchester school*; and it was for assaulting, beating and challenging one *Eyres* a clergyman, who was then second master of that school, for no other cause but that the said school-master reprov'd the defendant for something done at school.

A rule was made for the defendant to shew cause.

Smith versus Graham.

Attachment
against a bai-
liff for taking
insufficient
bail.

THE like rule was made upon a motion for an attachment against one *Chase* a bailiff, for taking insufficient bail, upon the arrest of one (at the plaintiff's suit) on a bill of *Middlesex*.

Martin

Term. S. Trin. 10 Georgii, 1725.

Martin versus Budgell. This Case was argued in Trinity-term, and again in Easter-term following.

THIS was a motion for leave to file a bill to warrant the proceedings in this court after a writ of error brought in parliament, and the want of a bill assigned for error; and upon a *certiorari* directed to the Chief Justice, he certified to the house of Lords, that there was no bill filed in *Hillary-term*; therefore it was now moved to file a bill * as of another term; and a rule was made to move the house of Lords for another *certiorari*; and the house ordered, that the plaintiff should have leave to bring another *certiorari* to certify a bill filed of *another term*; and now this court was moved, that the plaintiff might have leave to file a bill, as of that other term, (*viz.*) as of *Michaelmas-term*, and to enter continuances to warrant the proceedings; the like having been done in the case of *Walmsley versus Cerey*, where in the Common Pleas the *memorandum* was allowed to be mended, and set right by the bill, it being to affirm the judgment of this court, which had been affirmed on a writ of error in the Exchequer-chamber.

Want of a bill filed was assigned for error; and the Chief Justice certified, that no bill was filed in that term; it shall not be filed in another term.

Post 368.

* P. 284.

Now in the principal case a writ of error was brought in the house of Lords, after a bill exhibited in Chancery for relief, and that bill dismissed on hearing the cause; for which reason this court ought to do any thing in their power to support this judgment, especially since the merits are entirely against the plaintiff in error, otherwise he would have been relieved in equity.

This motion is improper, because the want of a bill filed in such a term, was assigned for error in the house of Lords, and that want was certified as of that term by the Chief Justice: therefore a bill of any other term will not warrant this proceeding; for the *memorandum* in this declaration refers to a bill of *Hillary-term*, which cannot be warranted by a bill of *another term*, and by entering continuances, and though the judgments in the Common Pleas are supported by originals of former terms by entering continuances, it doth not follow that the like may be done in this court; for in the Common Pleas, the *memorandum* in the declaration is always general, without referring to any certain term, as thus *alias prout patet termino Pasche, &c.* but in this court it recites, that the bill was of such a term, (*viz.*) *Memorandum quod alias scilicet termino sancti Michaelis* (the plaintiff) *protulit quandam billam suam*: now if there was no bill of that term, and the plaintiff should get judgment, it ought to be reversed for that reason.

Econtra.

Besides, where the want of a bill is assigned for error, the court may indulge the plaintiff so far as to give him leave to file one; but never after the Chief Justice hath certified the want of a bill of that term, and the record closed.

This

Term. S. Trin. 10 Georgii, 1725.

This being a judgment upon a demurrer, the want of a bill is
 * P. 285. certainly assignable for error, and it is a good cause * to reverse a
 judgment; and this appears by the + statute made for the amend-
 + 4 & 5 Ann. ment of the law; by which it is enacted, that all the statutes of
 c. 16. *Jeofails* shall extend to judgments by *confession*, *nil dicit*, &c. and
 no such judgment shall be reversed, so as an *original writ or bill*
 is filed; which imports, that if no bill is filed, the judgment shall
 be reversed.

Now if the plaintiff might have leave to file originals and bills at
 any time, it is in vain to assign the want of them for error; but it
 is plain this cannot be done at any time, because the *philizers* will
 not make them out after two terms, without application to the
 Chancery; and then it is allowed upon some equitable circumstan-
 ces, but not otherwise.

And the court seemed to be of opinion, that this motion was im-
 proper after the want of a bill filed in that term was certified by the
 Chief Justice.

The King *versus* The Inhabitants of St. John the Bap-
 tist, within the Borough of the Devises in the Coun-
 ty of Wilts. Saturday 22 June.

Being bound
 an apprentice
 and serving
 will not make
 a settlement
 without in-
 habiting.
 2 Ld. Raym..
 1371.
 Fortesc. Rep.
 321.
 Stra. 594.
 Foley 220.
 Cal. of Set.
 and Rem.
 120. pl. 159.

TWO Justices by an order removed *Warren* from *St. John*
Baptist to *Bishops Cannings*. Upon an appeal to the quarter-
 sessions, the order of the two justices was quashed, and the pau-
 per was sent back to *St. John Baptist*, as the place of his last legal
 settlement; which orders being removed into the *King's Bench*
 by *certiorari*, the order of sessions stated the fact specially, viz.
 That *Joseph Warren* junior, father of the said *Eliz.* and *Ann*
Warren (who are removed by the order) was born in the chap-
 pelry of *St. James*, and afterwards, on or before the 25th of
 March 1712. *John Powell* of the parish of *St. John's*, hosier and
 ropemaker, hired the said *Joseph Warren* as a weekly servant, and
 paid him weekly. That said *Joseph Warren* served him two years
 and upwards in manner aforesaid; that by indenture dated on or
 about the 25th day of March 1712. and executed two years after
 the date thereof, he was bound an apprentice to the said *John*
Powell, in which said indenture are contained two covenants in
 the words following, viz. And the said *Joseph Warren* the father
 doth hereby for himself, his executors and administrators, cove-
 nant and agree to and with the said *John Powell*, his executors
 and assigns, that he the said *Joseph Warren* the father, his executors
 and administrators, shall and will at his and their own proper
 costs and charges provide and allow unto and for his said son suffi-
 cient and necessary meat, drink, washing, LODGING, and apparel,
 and

Term. S. Trin. 10 Georgii, 1725.

“ and all other things fit and convenient for an apprentice of the said
 “ trade, during the last five years of the said term. And the said
 “ *John Powell* for his part doth hereby for himself, his executors
 “ and assigns, covenant, promise and agree to and with the said
 “ *Joseph Warren* the father, his executors and administrators, that
 “ he the said *John Powell*, his executors and assigns, shall and will
 “ well and truly pay or cause to be paid unto the said *Joseph War-*
 “ *ren* the father, his executors and administrators, the sum of
 “ 2s. 6d. of lawful money of *Great Britain* by the week, weekly
 “ during the third year of the said term of seven years, except such
 “ time or times as he the said *Joseph Warren* the apprentice shall by
 “ sickness or any other accident be unable to work at the said trade;
 “ and 3s. of like money aforesaid by the week, weekly during the
 “ fourth year of the said term, and 3s. 6d. of like money by the
 “ week, weekly during the 5th year of the said term; and 4s. of
 “ like money by the week, weekly during the last two years
 “ of the said term of seven years (except such time or times of in-
 “ ability as aforesaid); that in pursuance of the said indenture,
 “ the said *Joseph Warren* began to serve him the said *Powell* in
 “ his open shop in the said parish of *St. John's*, but had his meat,
 “ drink, washing, and LODGING, during all the time, with his
 “ father in *St. James's*, other than market days and Saturdays,
 “ when he received his meat and drink with his master in *St. John's*;
 “ but that he NEVER LODGED ONE NIGHT with his said Master or
 “ elsewhere in the PARISH OF *St. John* during the said apprentice-
 “ ship or service aforesaid. And further, it was sworn on behalf
 “ of *St. James's*, that the said monies payable to the said father
 “ by virtue of the said indenture were paid accordingly, and were
 “ in lieu and consideration for his maintenance and lodging as afore-
 “ said; now this court, on hearing counsel on both sides, doth
 “ quash the said order, being of opinion that the pauper gained no
 “ settlement in *St. John's* parish by the apprenticeship.

The King versus Cracker.

THIS was a motion for a rule on the under-sheriff of Cornwall, The defen-
 to execute a *capias pro fine* imposed on the defendant *Cracker*; dant was
 and that he might make the return immediately, and attend with found guilty
 it in court, or otherwise shew cause why he hath not executed it. upon an in-
 formation, in

This *Cracker* was found guilty upon an information in nature of nature of a
 a *quo warranto*, for usurping the office of Mayor of *Tregeny* in Corn- quo warranto,
 wall for several years successively; and now a rule was made that for usurping
 the sheriff should return this writ within ten days, or shew cause the office of
 why an attachment should not go against him. mayor, and
 fined.

* P. 286.

But the sheriff brought *Cracker* in on the day the writ was re-
 turnable, and he was committed to the King's Bench prison, till

Term. S. Trin. 10 Georgiæ, 1725.

the court should consider what *fine* to set on him, which was suspended until the term following; and a rule was made, that he should be carried down to *Tregeny*, at the next election-day for a mayor, in order to proceed to an election, which was done; and upon a *mandamus* directed to him for that purpose, (*viz.*) to elect and swear a new mayor, he returned that *T. S.* was duly elected mayor, and that he was willing to swear him into that office.

But he having misbehaved himself in this election, there being no more than two who voted for the new mayor, who was unwilling to take the office upon himself, lest he should be prosecuted upon an information for usurping the office, he refused to be sworn; so this *Cracker* continued mayor still, having been mayor, though he was six months in prison; and for this misbehaviour he was found guilty, and fined 200 *l.* and to stand committed till he paid it.

The King *versus* Pyke.

Information not granted where there hath been a peaceable possession of burges's ship for 14 years.

A Rule was made for the defendant *Pyke*, and one *Prideux*, to shew cause by what authority they claimed to be capital burges's of the corporation of, &c. and another rule for an information in nature of a *quo warranto* against this *Pyke* and one *Harrison*, (the two contending mayors) to shew cause by what authority they claim being mayors of the corporation, &c. and it was now moved to make both these rules absolute.

It is true, the defendants have sworn that they have been 14 years in possession of the capital burges's-ship, under a pretended election of them into that office; but since the election of a mayor very much depends on their being duly elected burges'ses, it was insisted that the court would grant this information, as they did in the case of the corporation of *Penryn*, notwithstanding a long acquiescence.

Econtra:

* P. 287. The objection in this case is not like that in the case of the corporation of *Penryn*, because here was fourteen years peaceable and uninterrupted possession, therefore the rule was discharged as to them, and that no information should be granted, but that the rule should stand against *Pyke* and *Harrison*, the contending mayors.

And an information in nature of a *quo warranto* being granted against them, it was said, that upon the trial of that information, and if the court should deny to grant an information against the capital burges'ses, they will contend that the prosecutor cannot give any disability of theirs in evidence, and therefore would be good witnesses against him.

To which it was answered by the court, that the right of a man shall not be tried in any collateral action to which he is not a party, therefore the disability of *Prideux* cannot be given in evidence on the trial of this issue; so the rule against him as capital burges's was discharged.

The

Term. S. Trin. 10 Georgii, 1725.

The King *versus* The Parishioners of Wilby.

UPON a motion to quash an order of settlement made by two justices, and which was confirmed upon an appeal to the sessions, the case appeared to be thus, (*viz.*) One *Humphry Carr*, about thirty years last past, built a cottage in the parish of *B.* on the waste of a manor belonging to the *Earl of Pembroke*, but without any licence or order so to do, and he enjoyed the same during his life, without any other right, and then died, leaving issue *Elizabeth* his only daughter and heir, who intermarried with *John Darby*, who with his wife *Elizabeth*, being seised of this cottage, sold it to *John Willy* for 30 *l.* and now the question was, whether this marriage had gained a settlement of *John Darby* the husband.

Where the husband gained a settlement by the marriage of his wife.

It was insisted that it had not, because the father of *Elizabeth*, the wife of this *Darby*, had no settlement there, for his entry was by disseisin, which gains no settlement; and if the father had none, his daughter could not have any settlement there.

But the court were of another opinion, because thirty years possession is a good title against the Lord of a manor, by virtue of the statute of limitations, if he should bring an ejectment to recover the possession.

Curia.
2 Sef. Caf.
123.

* Besides, *Elizabeth*, the wife of this *Darby*, and daughter and heir of *Humphry Carr*, was in possession by descent, which is a good title against any escheat the Lord might have at common law, and therefore her husband gained a settlement by this marriage.

* P. 288.

Crosse versus Talbot.

MOTION, on behalf of the defendant, to set aside the bail-bond given upon his arrest, and that common bail might be accepted for him; and he obtained a rule to shew cause. His affidavit shewed that he was retained as valet de chambre to *M. Hoffman*, the Duke of Holstein's resident here at twelve pounds twelve shillings per An. wages, and ten shillings a week board wages; and a certificate of this was produced, under the resident's own hand; but it did not appear that he either lay in the house, or actually executed the office.

Rule nisi to set aside bail-bond, given upon the arrest of an ambassador's servant.

The court held, that he ought to be a domestic servant, and really to * execute the duty of his office, and that being a meer nominal servant was not sufficient; and they discharged the rule.

* Where a person does not execute

the office for which he hath his certificate, but only gets himself entered upon the list, to have the benefit of a protection, the court will not endure it. Barnard. B. R. 79. See id. 401.

A

Term. S. Trin. 10 Georgii, 1725.

† Fitzgib. 200. pl. 12. 2 Stra. 797. 2 Ld. Raym. 1524. " A great many † cases have been since determined upon the same principle; but it was in those cases, holden, that the idea of a domestic servant was not confined to his lying in the foreign minister's house; provided he is a real servant to him, and actually performs the service.

Seviniack versus Marshall.

Plea by an administratrix, not good.

THIS was an action brought against an administratrix, who pleaded, that she had not assets *die impetrationis brevis originalis*, when the action was brought by bill, and not by original; and for this cause the plaintiff demurred, and had judgment.

The King versus Smart.

The estreating a recognizance was stayed, for that the defendant could not get his witnesses, who were sick. See stat. 4 Geo. 3. c. 10. for the more easy discharge of recognizances estreated into the Exchequer.

UPON a *certiorari* to remove an indictment, the defendant entered into a recognizance to try it at the next assizes, which he could not do by reason of the indisposition of some witnesses; and this appearing to the court upon *affidavit*, it was moved to stay the estreating of the *recognizance*, which was granted upon payment of costs, and entering into a rule to try it at the next assizes following, especially since the prosecutor can get nothing by the *Estreat* of the *recognizance*, but now he gets his costs.

* P. 289.

* Paterson versus Dyer.

A judgment by default shall not be impeached where the defendant made defence upon the writ of inquiry.

A Declaration was delivered in *Michaelmas-term*, and rules given for pleading according to the course of the court, but the defendant making default, the plaintiff's attorney signed judgment and gave due notice of executing a writ of inquiry; the defendant appeared at the time and place and made defence, but some time afterwards he would impeach the judgment, but it was not allowed, because he had made defence at the executing the writ of inquiry.

Anonymus.

Where the defendant ought to plead in chief.

THE defendant had leave to plead *de novo* within four days, within which time he ought to have pleaded *in chief*; but instead of that he pleaded an outlawry of the plaintiff in disability, &c. and thereupon the plaintiff signed judgment for want of a plea *in chief* within the four days; and this was held regular; but upon payment

Term. S. Trin. 10 Georgii, 1725.

payment of costs, and giving the plaintiff judgment in debt for his security, and bringing 20*l.* into court, and pleading to issue immediately, the judgment was set aside.

The King *versus* Purfell.

THE defendant being prosecuted for oppressing an honest man, under colour of a warrant of the *Chief Justice*, was ordered to answer upon *interrogatories*; and upon his examination he swore himself, and was indicted and convicted of perjury; and now he moved to set aside the said conviction, it appearing upon *affidavit* he could not be ready to make any defence at the trial; and upon this motion the verdict was set aside upon payment of costs, and entering into a rule to try it forthwith.

The defendant was convicted of perjury without making any defence at the trial, it appearing upon affidavit that he could not get his witnesses ready, and therefore the verdict was set aside.

Addison *versus* Paterfon.

ONE *Charles Fountaine* was arrested at the suit of the plaintiff, and the bail-piece was thus marked, (*viz.*) *Petrus Fountaine traditur in ballium, &c. qui arrestatus fuit per * nomen Caroli fountaine*; and in the recognizance of bail it appeared, that they were bail for *Peter Fountaine*; and now upon a *scire facias* brought against them, both the principal and bail plead this matter in abatement; and it was moved to set aside this plea, because the bail cannot plead this in abatement; besides the principal and his bail cannot join in one plea.

The bail cannot plead the misnomer of the principal in abatement. * P. 290.

The court was of opinion, that the bail could not plead this misnomer in abatement, tho' the principal might; so a rule was made for the defendant to answer over.

Springett *versus* Chadwick.

IN *debitatus assumpsit* for several things due to the plaintiff, to which declaration the defendant pleaded in bar, that he gave a note of 20*l.* to the plaintiff in full satisfaction of the debt, &c. and upon a demurrer to this plea the plaintiff had judgment, because a note thus given is no discharge of a debt or a duty.

Where a note under hand shall not be a discharge of a debt.

Palmer *versus* Byfeild.

Recognizance
taken in Lon-
don, and scire
facias on it to
the sheriff of
Middlesex.

* Allen 9.

Curia.

A Recognizance was taken before a judge of B. R. at his chambers in *Serjeants-Inn* in *Fleet-street*, *London*, and afterwards a *scire facias* was brought directed to the sheriff of *Middlesex*, without mentioning that the *recognizance* was enrolled; and now it was moved to quash the proceedings on this *sci. fa.* because it will not lie into * *Middlesex* upon a recognizance taken at a Judge's chamber; and the court was of that opinion; but that if the recognizance had been enrolled, the *sci. fa.* would have been good, either into *London* or to *Middlesex*, at the election of the party; but if not enrolled, then it lies into *London* only.

Clerk *versus* Dier. In Communi Banco.

Words nega-
tively spoken,
not action-
able.

IN an action on the case for these words spoken negatively, (*viz.*) *I never came home and pox'd my wife*; the plaintiff had a verdict, but the judgment was arrested by the opinion of the whole court, for that the words were too loose to bear an action.

* P. 291.

* *Saladine versus* Sir Jacob Jacobson.

Judgment a-
gainst a di-
rector of the
South-sea
company set
aside.
* 7 Geo. cap.
1. 5.

THE defendant was one of the directors of the *South-sea* company, and the plaintiff had obtained a judgment against him for 1000 l. and by the * statute 7 Geo. it is enacted, that every director, &c. shall deliver on oath before one of the Barons of the Exchequer before 25th March 1721. two inventories of all the real and personal estate, of which he was possessed or entitled unto in his own right, or of any other person in trust for him, &c. which shall discharge him from the demands of all other persons; all which estates shall be forfeited and recovered by virtue of that act, and shall be paid into the Exchequer, and applied for the benefit of the *South-sea* company.

And now it was moved for the opinion of the court, whether the defendant could avoid this judgment upon his own affidavit, that he gave in a true inventory pursuant to the act.

Curia.

All that is required in this case by the statute, is to give an exact and true inventory, and he swears that he gave an inventory pursuant to the act, so need not name all the particulars; and it is absolutely necessary that his evidence should be taken, because he best knows whether the inventory was true or not; so the judgment against him was vacated.

The King *versus* Powell.

UPON a motion for a trial at bar, it was offered for cause, Whether an antient custom shall be good against a charter. That a jury who had tried this very cause against one Jones, had found directly against the charter of this corporation, (*viz.*) That foreigners might be chosen to all the offices therein, by virtue of an old custom antecedent to their charter.

But the rule for a trial at bar was opposed, because if it should be granted, it would very much influence the next election of any person into any office in this corporation; besides this point might be brought before the court by special pleading.

Or by a special verdict found at the assises, and directed by the Curia. Judge, so there is no occasion for a trial at bar, especially since there is nothing in this case to be tried, but a point * in law, (*viz.*) * P. 292. Whether an ancient custom shall be good, and prevail against the express words of a charter.

Shelburne *versus* Stapleton.

THIS was an action brought for a penalty contained in certain articles of agreement, wherein the plaintiff covenanted that on payment of 1300 l. to him by the defendant, on or before the shutting the books for the *Christmas* dividend, he (the plaintiff) would transfer upon tender or payment, &c. and the defendant covenanted to receive so much stock, &c. and to pay the money, &c. on or before the transfer-day, on the penalty of so much, &c.

Tender how to be pleaded, and what are mutual covenants. Ante 40, 68, 105. Post 381. Stra. 615.

And it was further agreed, that upon any default in the defendant, it should be lawful for the plaintiff to sell the said stock at the market price, and to retain the said sum of 1300 l. and if there was any surplus, he (the plaintiff) was to pay it over to the defendant; but if the said stock should be sold at a lower rate than would satisfy that sum, then the defendant was to make up the deficiency.

And now, upon an action of debt in the Common Pleas, the plaintiff declared and set forth this agreement, and that on such a day before the shutting the books, he was at the *South-sea* house ready to transfer, and then and there tendered to transfer, and staid there till the shutting the books; and *licet* he had performed all on his part, the defendant was not there, nor any body for him to accept the said tender, or to pay the money; whereupon he sold the stock for 332 l. that being the market price; and assigned for breach of this agreement, that the defendant had not paid the deficiency, so that he (the plaintiff) is entitled to recover the penalty mentioned in the said articles.

The

The defendant pleaded in bar, that he made a feoffment of lands to the plaintiff in satisfaction of the principal sum, after the penalty was forfeited; but upon a demurrer to this plea, the defendant had judgment in the Common Pleas; and now upon a writ of error brought in the King's Bench, it was insisted for the defendant in error, that this judgment was given for errors in the declaration; for the plaintiff in the original action had not laid a sufficient breach of this agreement, which was to transfer the stock on or before the shutting of the books, &c. and that the defendant *superinde* was to pay the money; now the plaintiff had set forth, that the books were open to the 23d of December, and * that he on that day and hour, before the shutting the books at the *South-sea* house, tendered to transfer the stock, but did not aver that to be the *usual place of tender*; so that if no certain and usual place is assigned for a tender, it must be made to the person himself, unless the nature of the thing did ascertain the place.

* P. 293.

Now if a tender is not necessary, then another question will arise, (*viz.*) Whether those are *mutual covenants* or not; for if they are, then it must be admitted that each of the parties may maintain an action, without alledging the performance on his part; for if one covenants to do such a thing, and the other covenants to do another thing, each of them may have his mutual action.

† Lutw. 245.
See Vent.
147, 177,
214.
Sand. 319.

But that is not this case; for here the second thing to be done, so entirely depends on the first, that there is some precedent act to be done, to intitle the plaintiff to such second thing; and in such case he must shew that he had done all things by him to be done, before he can bring his action for not doing the other thing; and so is the case of † *Thorp versus Thorp*, (*viz.*) which was an action on the case on a special agreement, by which the plaintiff did agree to release the equity of redemption of a mortgage, *and all sums of money and demands whatsoever*; and in consideration thereof the defendant did agree to pay 7l. &c. and *mutual promises* were laid; and the plaintiff averred performance on his part, and that the defendant had not paid the money; the defendant pleaded in bar, that after the promise the plaintiff had *released all demands*; the plaintiff craved oyer of the release, which was of the equity of redemption, and of *all actions and demands*, and then demurred to the plea; and it was insisted to maintain the plea, that the plaintiff having laid mutual promises in this declaration, he might bring an action for the money before this release was executed; and if so, then the release is a good bar to the action, which is very true in some cases where mutual promises are laid; but not in this, because the release was part of the agreement, (*viz.*) *It was agreed that the plaintiff should execute a release, &c.* and it was upon that consideration that the defendant agreed to pay the 7l. therefore the release was to precede, and till that was executed the plaintiff had no cause of action; therefore it would be absurd to say, that the release shall discharge that very duty which it created.

So in the principal case the plaintiff covenanted, that he would transfer the stock on payment of so much money, on or before the shutting the books, &c. and the defendant * covenanted to receive * P. 294. the transfer, and to pay or cause to be paid *adunc proinde*; so that he is not to pay the money till an actual transfer, or a lawful tender to transfer; therefore the tender is in nature of a condition precedent, and is absolutely necessary in this case; and if that is not well laid in the declaration, the plaintiff can have no cause of action.

It is true, where the *covenants are mutual* an action will lie for either of the parties, without averring performance on his part; though one is the consideration of the other, and though *pro* or *in consideration*, &c. is in the declaration; but that is not this case, for here the defendant agreed to accept the transfer of the stock, and *adunc proinde* to pay the money; so that the plaintiff cannot maintain an action, unless the stock was transferred, or the tender to transfer, was well laid in the declaration.

Besides he should have laid a special performance on his part, and not by such a general allegation, as *licet* he had performed; all which was to be done on his part; for the action will not lie without alledging a special performance.

To which it was answered, that though the averment of performance was general, yet the pleading over of a collateral matter, had made that general allegation good, it being bad only in form. Cro. Car. 384. Vent. 114. 126.

Besides here is a certain time appointed for the performance of this agreement on the defendant's part, (*viz.*) on payment of 1300*l.* &c. on or before the shutting of the books for the *Christmas* dividend; and the defendant agreed to accept so much stock and to pay the money; now if either of the breaches are well laid, (*viz.*) The non-acceptance of the transfer, or the non-payment of the money, the plaintiff is entitled to this action.

But it being farther agreed, that upon any default in the defendant, it should be lawful for the plaintiff to sell the stock; and if the money arising by such sale would not satisfy the said 1300*l.* then the defendant would make up the deficiency, (if all the rest was out of the case) the plaintiff is entitled to sell the stock, and to maintain this action against the defendant in not paying the deficiency, according to his covenant.

The case is thus: *¶* An action of debt was brought for a penalty mentioned in articles of agreement, &c. in which the plaintiff declared, that by indenture, &c. *testatum fuit*, that he sold *South-Sea* stock to the defendant, and covenanted to transfer the same before the shutting the books for * the *Christmas* dividend; * P. 295. and that the defendant covenanted to receive and pay for the said stock before that time; but if he did not, then the plaintiff might sell it; and if the money arising by such sale would not make up 1300*l.* then the defendant agreed to supply the deficiency, for which the action was now brought.

It was objected, that by this agreement the plaintiff was to transfer the stock, which the defendant agreed to receive; so that unless the stock were actually transferred, or a lawful tender made to transfer it, the defendant was not bound to pay the money; and it was argued, that this was not a lawful tender, because the plaintiff set forth that it was made at the *South-sea house*, and did not aver, that was the usual place to make such tender; but yet the plaintiff is entitled to this action, because these are *mutual covenants*, and either party may maintain an action for non-performance.

It hath been likewise objected, that the money was not to be paid till a transfer was made of the stock, and an acceptance of that transfer; but this is a wrong construction of the covenant, for he was to pay the money before the shutting the books for the *Christmas* dividend, and not on the acceptance of the transfer; for otherwise it would be in his power to pay, or not to pay, which would be inconsistent with his covenant; therefore, in construction of this covenant, the intention of the party is to be a guide, and so far to govern as not to make the agreement repugnant in itself; and here the intention was plain, that on non-payment of the money the plaintiff might have this action.

Besides, the time of entering into this covenant is to be considered, and that was when the stock became an uncertain estate, as it was then; therefore the party agreed to have the money payable first.

The judgment of the Common Pleas was reversed: and the judgment of *B. R.* was reversed *in demo procerum*.

Williams versus Green.

Action upon a recognizance of bail may be brought against one or both.

JUDGMENT against the principal, and a *scire facias* was brought against the bail, and upon two *nihils* returned, there was judgment against the bail; and afterwards an action of debt was brought against one of the bail for all the money due to the plaintiff; and it was objected, that this action would not lie against one of the bail, because the judgment against them is joint.

Econtra.

* P. 296.
+ See 1 Lev.
225, 226.

* It was said on the other side, that the action was brought upon the *recognizance of bail*, which is joint and several, and consequently good, either joint or separate; and so is the case of + *Cornish* versus *Clerke*, Mich. 10 Geo. and so was the opinion of the court in this case.

Herbert versus Morgan.

Motion in arrest of judgment for excessive damages denied.

THE plaintiff was arrested at the suit of the now defendant in a fictitious action, without any colour of reason; and afterwards he brought an action of false imprisonment against the defendant, and the jury gave him 80*l.* damages; and upon a motion in

Term. S. Trin. 10 Georgii, 1725.

in arrest of judgment, because the damages were excessive, it was opposed by the plaintiff's counsel, and insisted, that he might have the benefit of the verdict, which was granted, and accordingly the plaintiff had judgment.

The King *versus* Reeves.

UPON a motion to quash an indictment, for that it was *præ-* Indictment quashed.
sentatum existit quæ billa est vera, instead of *quod lilla est vera*, a rule was made to quash it *nisi causa*, but no cause was shewn, and so the indictment was quashed for that fault.

Morgan's Case in the Exchequer.

IN trespass for taking his cattle, &c. the defendant justified as Custom, where it is well pleaded, where amer- ciements are to be affected, where not. Gilb. Eq. Rep. 209.
servant to one *Morgan*, setting forth, that he (*Morgan*) was sei-
fed of the manor of *D.* in fee, to which a *court-leet* did belong, &c.
and that time out of mind there had been a custom, that *quilibet te-*
*nen*s of a freehold tenement, and who was resident and an inha-
bitant within that manor, ought, upon notice or summons, to ap-
pear personally at the said *court-leet* three times in every year, (*viz.*)
At the feasts of *St. Michael* and *St. Hillary*, and at *Easter*; and for
default of appearance at the said courts, to pay to the steward of
the said leet to the use of the Lord 7s. for every default; and that
if he did not appear at two of the said courts, but did appear at the
third, then to pay an *essoin-penny* only; and farther, that if any such te-
nant being summoned * to be of the *grand jury*, and should not ap-
pear, that then he should be *amerced* 7s. by the steward, and that the * P. 297.
bailiff of the manor, by warrant from the steward, might distrain for
such amerancements, and sell the distress, &c. then he sets forth, that
the plaintiff was summoned to appear at two several courts, and made
default; and that he was likewise summoned to be of the grand jury,
&c. but did not appear at that court, for which defaults he was
amerced 28s. and because it was not paid, *Richard Hughes*, steward
of the said leet, made his warrant, directed to the defendant, to levy
the same by distress and sale of the plaintiff's goods, *virtute cuius*
he distrained the cattle, &c. and sold them and paid 28s. to the
steward, for the use of the Lord of the said manor, *quæ est eadem*
transgressio, &c.

And upon a demurrer to this plea, several exceptions were taken to it.

(1.) That the custom was void, because it was laid too gene-
ral.

(2.) That

Term. S. Trin. 10 Georgii, 1725.

(2.) That it was void, because it is for the steward to amerce without any *affeerment*.

(3.) That here was a double amerciamment for one and the same default at one court, (*viz.*) In not being of the homage, and not appearing at that court.

(1.) As to the first exception, this custom is void, because it is laid too general, (*viz.*) That *quilibet tenens*, &c. used and ought to appear, without exception of the quality, degree or sex of persons, whereas several are exempted from appearing and attending at the *leet*, both by the common law and statutes of this realm; as *infants*

* 1 Inst. 172. under the age of 12 years, and this is by the * common law; and
+ Marlbridge *ecclesiastical* persons are exempted by the statute of + Marlbridge,
cap 10. anno (*viz.*) *Archbishops, Bishops*, &c. are not to appear at the sheriff's
52 H. 3. tourns, and consequently not at *leets*, which were derived out of
the tourns; and if they should be distrained for any amerciamment,

* F.N.B. 165. &c. for not appearing in the *leet*, thy have a * writ upon the statute
2 Inst. 120. by way of privilege; for as they are not obliged by law to appear
121. at *leets*, so they are not amerciable for not appearing; therefore this
Register 175. custom being general, and not setting forth these exemptions, is

+ 1 Inst. 15. a. void, and cannot subsist against the statute of + Marlbridge, which
2 Roll. Abr. is introductory of a new law, and destroys all customs and prescrip-
68. tions against it.

W. Jones

270. 290.

* P. 298.

+ Magna

Charta, c. 14

* (2.) This custom is void, because it is laid for the steward to
amerce, without an affeerment, and this is directly against + *Magna*
Charta, by which it is enacted, that *amerciamentis shall be assessed by*
lawful men of the vicinage, (*i. e.*) shall be assessed by those lawful
men appointed in courts-leet, upon oath, to settle and moderate the
amerciament of such who have committed faults arbitrarily punish-
able, and have no express penalty expressed by any law or statute;
so that to assess is properly to tax, or to reduce a thing to a certainty
by persons on their oaths, and ought to be *per pares*; but this is a
certain amerciamment imposed by the steward, without any ass-
ment, and is therefore void.

(3.) This is a double amerciamment for one and the same default
at the last court, for the plea sets forth that the plaintiff being sum-
moned to be of the grand jury, did not appear, for which he was
amerced 7s. and he was amerced 7s. more, for not appearing at that
court, which is double, and exceeds the custom.

Eccontra for
the defendant.

(1.) To which it was answered, (*viz.*) As to the first exception,
§. The custom is good and well pleaded, though the exemptions
are not set forth in the plea, for that the defendant is not obliged by
law so to do; but the person distrained is to shew, that he is ex-
empted from such distress, if he is really intitled to any such ex-
emption, for the custom is *lex loci*; and if there was any exemption,
by virtue of the custom, the plaintiff ought to have shewn it; now
to instance a parallel case:

Upon

Term. S. Trin. 10 Georgii, 1725.

Upon disbanding the army, an act of parliament was made, giving privilege to the soldiers to exercise their trades any where in England; now, supposing that there is a custom in the borough of H. that no person shall exercise a trade therein, unless he is free of that borough, and an action should be brought against a soldier upon a by-law founded on this custom, certainly the custom may be laid in general, and the exemption must come on the soldier's side; for it is not required, either by the statute or common law, that exemptions should be set out in pleading of customs; but the party who is to have the benefit of an exemption, must set it forth, and shew that he is not within the custom by reason of the exemption. 1 Sid. 17, 18.

So where a custom was alledged to distrain *any thing within such an honour*, it was objected to be too general, because several things are not distrainable, but are privileged and exempted from distresses, (*viz.*) *Averia carucae*, and goods taken in execution by the sheriff, and workmen's * tools, &c. and the book tells it is not necessary * P. 299. to set forth such exemptions, because it is immaterial, and would make the pleadings too long; therefore the person exempted must shew it, and that he is not within the custom by reason of his exemption.

(2.) As to the second point it was argued, that this custom is good to *amerce without an affeement*; for though it hath been objected that it is contrary to *Magna Charta*, and that the general rule of pleading in such cases, is to set forth an *amerciament*, and that it was *affeered*; yet notwithstanding *Magna Charta*, and that rule of pleading, there may be an *amerciament* by custom to a *certain sum*, for this statute was made in affirmance of the common law; and therefore though it is in the negative, (*viz.*) *That no freeman shall be amerced*, yet there may be a *prescription* or *custom* against it.

This was the Lord Coke's opinion in his first Institutes, (*viz.*) 1 Inst. 115. a. where a statute in the negative is in affirmance of the common law, a man may prescribe against it; as for instance; by the statute of * * Magna Charta it is provided, that *leets* shall be holden twice a year Charta, c. 35. only, (*viz.*) after *Easter* and *Michaelmas*; yet a man may prescribe to hold them oftner, and at other times, because that statute is but Plow. Com. 465. an affirmance of the common law.

Besides Peers of the realm are within this statute as well as commoners, and the *amerciament* of Peers is not used at this day, because it is reduced to a certainty by custom, (*viz.*) A Duke to 10*l.* and others to 5*l.* and that such custom is good; and by the same 8 Rep. Greifly's case. reason an *amerciament* may be reduced to a certainty by custom; and if such custom is good, then there cannot be any occasion of *affeering* an *amerciament*, because to *affeer* is only a taxation reducing that to a certainty, which was uncertain before; but it is absurd to say a thing shall be reduced to a certainty, which was certain in itself before the *affeement*; so that the reason of *affeering* fails

Term. S. Trin. 10 Georgii, 1725.

in this case, if the sum is reasonable; but if it is unreasonable, then the custom is void, and cannot stand. *It appears by the * old books, that customs to have particular sums are good; as a custom that the Lord of a manor shall have 3l. for every pound-breach; this is good against the tenants, though not against strangers; so in the principal case the sum is reduced to a certainty, and the custom charges the tenants but not strangers; a man may prescribe to have a certain sum of money from any person * found guilty of an affray in a leet, and such prescription is good.*

This punishment is here called an *amerciamment*, but it is not properly so, but a *fine* imposed by the court, whereas *amerciamments* are always by the jury; now *Magna Charta* mentioning *amerciamments*, for that reason they are to be affeered, for the judgment in an *amerciamment* is general, (*viz.*) *Quod sit in misericordia*, and afterwards upon *estreats* directed to the coroner they are affeered; but a *fine* is not to be affeered, because not mentioned in that statute, which is the foundation of all *affeerments*; and there are authorities in *† 10 H. 6. 7.* in *†* point, that an *amerciamment* imposed by a steward of a leet, which is in nature of a customary fine, need not be affeered, though the custom had not ascertained the sum; therefore there can be no need of an *affeerment* where the sum is made certain by the custom.

† 10 H. 6. 7.
Bro. Amer-
ciamment 50.

(3.) As to the third exception, that the plaintiff is doubly amerced for one and the same fault, it is not so; and this appears by setting forth the custom, *viz.* that every tenant who should not appear, &c. (being summoned) to be of the homage, should pay 7s. and that if he did not appear at two of the said courts, and appeared at the third, he should pay an *effoin-penny*; but if he did not appear at the third, and pay the *effoin-penny*, he should then pay 7s. for each of those defaults; but the custom is not laid to amerce for non-payment of the *effoin-penny*, for that was not to be paid, but where the party neglected to appear at two courts, and appeared at the third; but here was a total neglect; for the defendant did not appear when he was summoned to be of the homage, nor at two other courts, nor at the third court; the custom being that, if he did not appear at that court, and pay the *effoin-penny*, then for every default he should pay 7s. which must be understood for every default in not appearing, &c. and not for non-payment of the *effoin-penny*; so that this is not a double *amerciamment* for the same default, but several *amerciamments* for several defaults in not appearing, &c.

Curia.

It is agreed, that this custom would have been well laid if the exemptions had been set forth, and not so general that *quilibet tenens* should appear, &c. but it is certain, that such exemptions which are by the common law, as of infants under twelve years, and women, &c. were never yet set forth in pleading of customs.

But

But it hath been objected, that by the statute of *Marlbrige* clergymen are exempted, and that this custom cannot * prevail against * P. 301. that statute; which is very true; but this doth not alter the method of laying a prescription or custom in pleading, which ever since the statute was made, have been laid without mentioning any exemptions, but generally as in this case.

It is true, if any persons had been exempted by the custom itself, such exemption must have been set forth in pleading, because the custom is intire; but it is not necessary to set forth any other exemptions; therefore this custom is well laid.

The statute of *Marlbridge* never intended by those exemptions of ecclesiastical persons to destroy *leges loci*; but those laws still remain as they did before, and persons who will have any advantage of them must plead them; for it is the nature of *exemptions* to be exceptions out of the general rule; and it would be not only informal, but unreasonable to set them all forth in pleading; so as to the first point, the court were all of opinion that the custom was well pleaded.

As to the second point it was agreed, that *amerciements* are to be affeered, unless they are in nature of a *fine*, and that there is no occasion for an *affeerment*; but where the *amerciament* is discretionary, which is not this case; for here the sum is ascertained by custom, and the steward cannot encrease or diminish it; and therefore this *amerciament* ought not to be affeered, (1.) because it is in nature of a *fine for a contempt*; (2.) because the custom hath ascertained it, and it is not discretionary; and of this opinion were the Chief Baron and two more.

But the other Baron differed, for he was of opinion, that if the custom is abrogated by *Magna Charta*, then this *amerciament* must be affeered, and that the custom was abrogated by that statute; by which it is enacted, that all *amerciements* shall be affeered *per pares*; it is true, *fin*es are not within this statute, but *amerciements* are, and a *fine* is a ransom from imprisonment; and where-ever a leet may imprison, it may assess a *fine*, as a price to redeem the party from an imprisonment, and a commitment always follows a *fine*; and therefore a *capiatur* lies for finable offences; but in *amerciements*, where the judgment is that the party shall be in *miseria cordia*, (as it is in this case) there they are to be affeered.

It is true, the *amerciament* of Peers is made to a certain sum, but it is by order of the house of Lords; and this was to prevent the * P. 302. frequent application to the house when a * Peer was to be amerced; but the principal case being only a nonfeasance, and no breach of the peace, or contempt of the court, the steward cannot set a fine for it; and if so, then it falls back to an *amerciament*, and must be affeered *per judicium parium*.

(3.) As to the third point, that here is a *double amerciament* for one default; the Chief Baron was of another opinion, for *amerciament*

ciament was in two instances, (*viz.*) For a default in not being of the *grand jury*, and for a default in not appearing at that court; and where a man is bound to appear in two respects, and doth not appear, those are several defaults.

And another Baron was of the same opinion, (*viz.*) That it is not a double amerciamment for the same default; for if an officer who ought to attend the court by virtue of his office, and likewise as a grand jurymen, should make default, he is to be fined in both respects; and in one there is no consideration to be had of the other; therefore notwithstanding this objection, the plea is good.

But two of the Barons were of opinion, that this custom was void for the reasons following, (*viz.*) Every custom must have a reasonable commencement, which this custom had not; for it being in time immemorial, 7s. is too great a sum to pay for such a default; besides it is unreasonable, because it involves *every person* in it, when some persons may have a reasonable excuse to be absent; as for instance; a sheriff may be called to attend on the King's person, &c. *Adjournatur.*

Stamper *versus* Hodson.

A *fi. fac.* and *ca. sa.* taken out at the same time, the defendant was taken upon the *ca. sa.* and the *fi. fac.* was quashed.

THE plaintiff having obtained judgment in debt against the defendant sued out a *fi. facias*, and likewise a *capias ad satisfaciendum* at the same time; and thereupon the defendant was taken in execution, and it was now moved to quash the *fi. facias*. The court was of opinion, that the plaintiff might for his own security take out two writs, but he can execute but one; therefore this writ of *fi. facias* was quashed.

* P. 303.

* Page *versus* Barns.

† 4 & 5 Ann. cap. 16. Where wager of law will lie.

BY the statute for the † amendment of the law, it is enacted, that *actions of account may be brought against a bailiff or receiver, for receiving more than his just share*; and an action of account was brought upon this statute against the defendant as bailiff *ad merchandizandum*, who waged his law; and upon demurrer it was objected, that wager of law would not lie in account against a bailiff *ad merchandizandum*; but if such action had been brought against a receiver, and the plaintiff did not shew by *whose hands*, there wager of law would lie; and so it was adjudged in this case for the plaintiff.

Gravenor *versus* Salter.

“ ERROR to reverse a judgment in ejectment after a verdict. Objections in in ejectment, after ve dict over ruled.
“ *Simons* excepted to the declaration; for that the writ recited therein has mistaken the plaintiff for the defendant, and so charged a demise of the lands to the defendant instead of charging it to the plaintiff: and the declaration pursues the writ by referring thereunto, as *demisit tenementa prædicta*; or else it is void for uncertainty. 2dly, The *venire facias* as contained in the *postea* is ill, for the words are only *ad veritatem infra content' electi, triati, & jurati, dicere super sacramentum suum quod, &c.* omitting *dicend'*.
“ But the court over-ruled these objections, and affirmed the judgment.

Salter *versus* Grosvenor.

In ejectment, &c. the case was thus: A corporation aggregate consisting of two bailiffs and burgeses, &c. and one of the bailiffs and the burgeses made a lease in their politick capacity to the other bailiff in his natural capacity; and the question was, whether this lease was good, or not. Two bailiffs of a corporation, the one makes a lease to the other, it is void.

It was argued, that it was void, because the bailiffs are an integral part of the corporation, and they both make but one officer; and therefore where one is severed in any corporate act, it makes that act void; for if one bailiff could do a corporate act separately, this inconvenience would naturally ensue, (*viz.*) They might act directly contrary to each other; and therefore the meaning and intent of the charter in making two bailiffs was, that they should be both present, and concur in every corporate act. Cro Jac. 234. 13 H. 8. 10. 14 H. 8. 2, 29. Co. Litt. 112, 160, 187. Dyer 304. Chan. Rep. 21, 117.

And for this purpose the case of *† Wood and the Mayor and Commonalty of London* was cited, (*viz.*) Debt was brought in the court of the mayor and aldermen of *London*, for a penalty upon a by-law made by the common council; and it was for 400*l.* penalty, of which 300*l.* was to be to the use of the mayor and commonalty; and it was held, that this suit in the mayor's court was proper, if he could be severed, and the court could be held before the aldermen; but he being an integral part, so as no court could be held without him, it could not be sued for in his court, for then the same person would be both plaintiff and judge. † Salk. 397. pl. 3.

* The court was of opinion, that a sole corporation, as a bishop, or a parson, could not make a lease to himself, because he cannot be both lessor and lessee; and the law is the same in a corporation aggregate, as *Dean and Chapter*, for a lease cannot be made

Term. S. Trin. 10 Georgii, 1725.

by the *Chapter* without the concurrence of the *Dean*; and for the same reason, a lease cannot be made to the *Dean* without the concurrence of the *Chapter*, but it may be made to any of the *Prebendaries*, because it is not necessary that any of them should join in the lease, for a *Prebendary* is not an integral part of the body corporate.

But in the principal case the bailiffs make but one officer, and the one cannot act without the other; therefore if a lease is made by the corporation to one of them, he is both lessor and lessee, which cannot be.

If process should be directed to the sheriffs of *London*, and one dies, the process is gone, because one sheriff cannot act without the other, for they both make but one sheriff; and for these reasons the whole court was of opinion, that this lease was void, and judgment was given accordingly.

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Term. Sanct. Mich.

Anno 11 Georgii, 1725.

Barnsly *versus* Shrimpton.

After a plea in *nullo est erratum*, it is never admitted to amend general errors.

A Writ of error was brought, and the general error assigned, and likewise the want of an original, and a warrant of attorney; and after *in nullo est erratum* pleaded, a rule of court was obtained to amend the errors assigned, but it was discharged upon a motion for that purpose; for after such a plea it is never admitted * to amend general errors; it is like Not guilty pleaded by the defendant, who is never admitted after such a plea to justify, or to plead specially.

* P. 305.

Cowper

Cowper *versus* Ginger.

THE plaintiff obtained judgment against two defendants in an action of debt, and one of them brought a writ of error, when it should be brought by both, and then he who would not prosecute ought to be summoned and severed; which not being done, this was held to be a fault not amendable, and thereupon the writ of error was quashed; the like judgment was given in *Hillary-term*, anno 6 Geo. in *B. R.* in the case of * *Brewer versus Turner*.

Judgment in debt against two defendants, both must join in a writ of error. Stra. 606. 2 Ld. Raym. 1403. Post. 316. * Stra. 232.

Bond *versus* Turner.

JUDGMENT was obtained by the testator, who died, and his executor sued out a *scire facias* against the defendant, and had judgment therein, and then he sued out a *capias ad satisfaciend.* against him; and upon *non est inventus* returned, he sued out a *scire facias* against the bail; and upon a motion made to stay the proceedings against them, as being irregular, because there were but four days between the *teste* and the return of the *scire facias* against the principal, that motion was granted; and then the plaintiff moved to quash all the proceedings for his own expedition, which was likewise granted upon payment of costs.

Capias against the principal, and sci. fa. against the bail, but it was irregular, because there were but four days between the teste and the return.

Savill *versus* Snell.

IN an action of covenant in certain articles of agreement, wherein the defendant covenanted to find diet and lodging for the plaintiff for a year, or to pay him 10*l.* the defendant, upon *affidavit* made that there was not above 10*l.* due to him, moved to bring it into court, and that the plaintiff might proceed at his peril.

Money brought into court.

The court could not ascertain what was due for diet and lodging; but because the agreement was in the disjunctive, (*viz.*) To find diet and lodging; or to pay 10*l.* a rule was made, that the defendant might bring it into court.

* Henly *versus* Rosse.

* P. 306.

THE defendant was arrested, and no declaration being filed against him within two terms after the arrest, he procured a *superfedeas* and was discharged, and immediately afterwards he was arrested again by a *capias* out of the Common Pleas, at the suit of the same plaintiff, and for the same cause of action; and upon a motion to discharge these proceedings, because irregular,

After an arrest the plaintiff must declare in two terms, otherwise the defendant shall have a *superfedeas*.

Term. S. Mich. 11 Georgii, 1725.

The court was of another opinion, for that the defendant had a right to *supersede* the action, because no declaration was filed against him in time; and as he had a right to *supersede* that action, certainly the plaintiff must have liberty to proceed in another; for his debt is not lost for want of declaring in time, but only that action is gone, and therefore a new action may be brought.

Lawson *versus* Dickenson.

Where deeds are delivered upon a special trust, the party cannot detain them.

THE plaintiff had an estate mortgaged to him, and the defendant who was an attorney, and who drew the mortgage, did by that means get all the deeds relating to the title into his possession, and now refused to deliver them to the plaintiff, unless the mortgagor would pay a debt due from him, as the defendant pretended.

And now upon a motion for a rule to deliver the deeds to the plaintiff, for that he (the defendant) made the mortgage, and therefore shall not be allowed any money due to him from the mortgagor, before or after the mortgage, but that he should deliver up the deeds upon payment of what is due for drawing and engrossing it.

The court was of opinion, that an attorney may detain papers till the money is paid for drawing them; but that he cannot detain any writings which are delivered to him *on a special trust*, for the money due to him in that very business; therefore a rule was made for the defendant to deliver those deeds to the plaintiff.

The like rule was made between *Hooper* and *Haward* this term, that an attorney should deliver several deeds of lands which he received for a certain purpose, and would have kept them, because he pretended his client had a mortgage on those lands; and the rule was, that he should deliver * them by such a day, or an attachment should go against him; and accordingly he delivered them up on the day, but was ordered to pay costs and such damages to the party, as the Master should think reasonable for what the plaintiff had sustained for want of the deeds; because it appeared that the defendant had received the profits, and kept the plaintiff out of possession by this means.

And in the case of *Geary versus Fashion*, a rule was granted for an attachment against the defendant for not delivering deeds to the plaintiff; and the like rule between † *Strong* versus *How* for not delivering deeds given to him in order to borrow money on them.

Term. S. Mich. 11 Georgii, 1725.

Elliott *versus* Cowper.

AN action was brought against the *endorfor* of a promissory note, wherein the plaintiff declared, that one *Coates fecit notan* in writing (omitting the words *manu sua subscript*) by which he promised to pay to the defendant or order, so much money, &c. that the defendant endorsed this note to the plaintiff, and that, *licet* he demanded the money *de eodem Coates*, he did not pay it.

Action against the endorfor of a promissory note.
2 Ld. Raym. 1376.
Str. 609.

The defendant demurred specially, for that the plaintiff did not set forth that *Coates* of whom the money was demanded, was the same *Coates* who drew the bill; to which it was answered, that the declaration sets forth that the note was made by one *Coates*, and that the plaintiff demanded the money *de eodem Coates*, which is a good and certain averment that he was the same person; and the court was of that opinion.

Then it was objected, that the * statute which gives credit to such notes, and a remedy to recover on them where there was none at law, enacts, that *all notes signed by any person, &c.* and it doth not appear by this declaration, that *Coates* signed this note.

* 3 & 4 Ann. c. 9.

To which it was answered, that the plaintiff set forth that *Coates fecit notam*, which implies signing it; for he could not make it without signing it: the plaintiff had judgment.

The King *versus* Roberts.

THE defendant was indicted and acquitted in this court, and afterwards brought an action in the *Marshalsea* against the prosecutor for a malicious prosecution; upon which the defendant in the action was held to special bail, and now a motion * was made by *Kettleby*, to stop the proceedings there, because this court being possessed of the principal cause, may better judge whether the prosecution was malicious or not.

Upon an indictment and acquittal in B. R. an action was brought in the *Marshalsea* for a malicious prosecution, but set aside.

* P. 308.

Strange contra insisted, that debt lies in the *Marshalsea*, or in any other inferiour court, upon judgments in the courts of + *Westminster*; the reason of suing below, is for the advantage of holding the defendant to bail; and there is a custom in that court, that the attorney shall answer for such bail as he takes; so that if the proceedings should be staid, the plaintiff would lose that benefit which he hath below against the attorney; for in truth the bail are worth nothing.

Econtra.
+ Salk. 209.
pl. 3.
Sid. 180. pl.

"It is highly inconsistent to have the reasonableness of suing here determined below; whereas there are any particular circumstances of aggravation, a judge may require special bail, though

Curia.

Term. S. Mich. 11. George, 1725.

* But see now " the writ does not * require it. However, if we stay the proceed-
 stat. 12 G. c. " ings below, we will order the defendant to find special bail;
 29. perpetua- " which the defendant below agreeing to, the proceedings were
 ted by stat. " stayed. The court agreed the cases in *Salkeld* and *Siderfin* to be
 23 G. 2. c. 3. " law.

Anonymus.

An executor *§*. **A**N executor moved the court to enlarge the time for pleading,
 was denied to have the time to plead en-
 larged, the rules being out, unless he would enter
 into a rule not to plead any judgments. **A**N executor moved the court to enlarge the time for pleading,
 the rules being out; which was opposed, unless he would
 enter into a rule not to plead any judgments obtained against him
 after the rules were out; for otherwise he might confess judgments
 in the mean time, and plead them in bar to the plaintiff's demands.
 Thereupon the court said they would not deprive the plaintiff
 of any advantage he had by law to recover his debt, unless the de-
 fendant would enter into such a rule; which he refusing, the court
 would not enlarge the time.

The King *versus* The Hamlet of Spittlefields.

Settlement of a poor man is where he dwells, and not where he works. **T**HE case upon an order of removal, &c. *§*. The husband
 worked at a *silk-throwster's* in the hamlet of *Spittlefields* for
 five years, but never lay where he worked, but at a lodging else-
 where; the justices of peace being of opinion, that the husband had
 gained a settlement by this means, did after his death by an order
 remove his widow thither, which order was confirmed upon an
 appeal; but both the orders were quashed, because the court was
 of opinion that the husband's working there gained no settlement;
 and so it was resolved in the case of a *†* cobbler who worked in a
 stall in the parish of *St. Giles's*, and had an apprentice who worked
 with him in that stall, and both lay in another parish; it was ad-
 judged that the working in the stall did not gain a settlement, for
 that was in the parish where * he lay, and that a man cannot be re-
 moved from his work, consequently his working in a certain place
 shall not gain any settlement there.

† *Stra*, 31.
Cal. of Set.
and Rem. 82.
pl. 106.
Ses. Cal. 115.
pl. 112.
Foley 222.

* *P.* 309.

The

The King *versus* Austin.

AN order of sessions was made to hinder the defendant from *selling ale*; and the exceptions following were taken to this order.

Order of sessions to hinder the defendant from selling ale, quashed, because the county was only in the margin, and not in the body of the order.

Fortesc. Rep.

325. 2 Ld. Raym.

1406.

(1.) For that it did not appear by the order that it was a *common alehouse*: every alehouse may not be a common alehouse.

(2.) It doth not appear that the defendant was *summoned*, or present when this order was made.

(3.) The county is only in the margin, and not in the body of the order; so that it doth not appear in what *county this alehouse* is; which is necessary to the jurisdiction of the justices.

Orders of settlement for removal of poor persons are ill, without shewing the place from which removed to be within the county. *Caf. of Set. & Rem.* 115. *pl.* 151. *Ses. Caf.* 299. *pl.* 181.

(1.) As to the first exception it was answered, that every *alehouse* is a *common alehouse*; and as to the second exception, that he was not summoned to appear before the justices; it is true, a summons had been necessary if the * statute had not given the sessions or two justices an absolute power to put down alehouses at their discretion; so that where they have an unlimited power, it is not necessary to set forth any *summons* in their order; neither is a summons ever set out in orders, but in convictions for deer-stealing or the like; where great fines are imposed, there it is usual to set forth that the party was summoned; but it is not so in orders for bastardy.

Econtra.

* 5 & 6 Ed. 6. cap. 25.

The third and most material objection, that the county was not in the body of the order, but only in the margin; it was said, that it was not necessary it should be in the body of the order, because it was no crime to keep an alehouse; it is true, in all criminal cases, either upon indictments, convictions or orders; if the county is only in the margin, and not in the body of the order, the proceedings ought to be quashed; and so it hath been resolved several times, as in the case of *The King versus The Parish of Sberingham, Pasch. 8 Geo.* and the *King versus Marsh, &c.* because the county in the margin shews only, that the order was made in that county, but not that the alehouse was there, or that the person who kept it lived in that county; so that the justices of the county have no jurisdiction.

" *Pratt Ch. Just.* There is no difference between an alehouse, and a common alehouse. 2dly, If an alehouse is suppressed for any disorder or offence committed by the party, he ought to be summoned: otherwise when it is suppressed by the discretionary power of the justices. An alehouse may be suppressed, as Lord Hale

Term. S. Mich. 11 Georgii, 1725.

" *Hale* says, *Pl. Cr.* if kept in an inconvenient place, the
" order does express it to be a disorderly house, and a common
" bawdy-house.

" *Fortescue* Just. It was a question in Lord *Holt's* time, whether
" justices were bound to give a reason why they suppressed an ale-
" house. He was of opinion they ought, because the party had
" a right or interest vested in him by the licence. Here a reason is
" given, *it being a disorderly house.* 2dly, I do not remember it has
" ever been held necessary to shew a summons upon these convic-
" tions: the distinction has been between *mandamus's* and convic-
" tions by reason of the greatness of the punishment. In an order
" of bastardy a summons is never shewn. *Queen v. King.* And
" *Parker* Ch. Just. said, the objection had been often taken to or-
" ders of bastardy, but never prevailed. A conviction of deer-
" steeling, saying, *having been summoned,* is sufficient.

" *Pratt* Ch. Just. *Major sit, an minus, non differt;* be the pu-
" nishment greater or less, it makes no difference; the party in each
" case ought to be summoned, and the summons ought to be set
" out.

" *Raymond* Just. I remember upon a motion of my own, an ob-
" jection for want of a summons was taken to an order for sup-
" pressing an alehouse, but the order was confirmed. The distin-
" tion taken by *Fortescue* justice seems very reasonable.

* P. 310. * The court demanding of the secondary how the precedents were
in such cases, he answered, that the court was divided, as to this
† Ante 3. matter, in a case between the *King* and † *Glegg*, which was in a case
of bastardy; and that the name of the county in the margin hath
been held good in some orders of removal.

Curia. " *Cur.* The third exception is fatal. In all criminal prosecutions
" it will not be sufficient to put the county in the margin; for that
" can only prove the order made by the justices of that county, but
" is no argument that the fact was committed in that county. No
" difference between indictments and orders. *Rex v. Marshall,*
" *Trin. 10 B. R.* this is a criminal prosecution, for it is adjudged a
" bawdy-house, and suppressed as such. *Adjournatur.*

Graves *versus* King.

Where the
judgment shall
be as of the
first day of the
term.

THE plaintiff had judgment in *Hilary-term* 1722. which was
now three years ago, which judgment was signed the 14 day
of February, two days after that term, and the execution bore teste
the 12 Feb. 1723. And no *scire facias* first sued out to revive the
judgment, which *Raby* urged to be irregular, for the judgment re-
lates to the first day of the term, so that there is above a year be-
tween the judgment and the execution. The day of signing the
judgment, which is required by 29 C. 2. c. 3. has no other relation
than

Term. S. Mich. 11 Georgii, 1725.

than as it affects purchasers, in respect to the plaintiff and the defendant, and as to all other purposes, it is a judgment of the first day of *Hilary-term* 1722. by fiction of law; so that the teste of the execution ought to be the first day of that term, otherwise it is wrong; and therefore it was moved to quash this execution.

Fazackerly contra: It was said, that the plaintiff was right in point of fact, though he was wrong by a fiction in law; therefore it was moved that the plaintiff might have leave to enter *continuances* to the last day of this term, so as to make it a judgment of that day; or that he might have leave to get the judgment signed as of the succeeding term, as a fine taken in vacation may be entered either of the preceding or succeeding term.

But the court denied leave to enter *continuances*, this being now a record of three years standing, neither would they give leave to enter the judgment, as of the succeeding term; it is true, it hath been done in fines, but these are by the agreement of the parties, but judgments are obtained upon adversary suits; therefore the judgment in the principal case must be of the first day of *Hilary-term*. The court was divided as to quashing this execution.

"*Pratt* and *Powys* were of opinion that the court ought not to interpose to set aside the execution.

"*Fortescue* and *Raymond* held the execution void: it is not by a fiction of law, it is the law itself; that all judgments, tho' signed the last day of the long vacation, are judgments of the first day of the term preceding: it cannot be a judgment the 14th of February, for the court gives no judgment in vacation. A fine taken in vacation may be entered either of the term precedent or subsequent, it being the agreement of the parties.

The court being divided no rule could be made; wherefore let the execution stand.

* Skipworth Mil' *versus* Green.

* P. 311.

IN an action of covenant for non-payment of rent reserved on a lease for years made by the plaintiff, as *guardian to the Lord Craven*, wherein he demised meadow, pasture and arable land to the defendant, and amongst the rest all those two closes called or known by the name of *Lane's meadow*, and the defendant covenanted to pay the rent, and also 5*l.* per acre, for every acre of meadow or pasture ground, which he should break up or plow; and the breach assigned was, for that the defendant had plowed up *duo prata vocat. Lane's meadow*, by reason whereof he is to pay 560*l.* and for non-payment thereof this action was brought.

The defendant justifies, for that the lands called *Lane's meadow*, were, time out of mind, arable lands, *absque boc*, that they were meadow lands.

Parties to an indenture are estopped to deny essential, but not descriptive words. Stra. 610.

Term. S. Mich. 11 Georgii, 1725.

Reeve for plaintiff. And upon a demurrer to this plea it was insisted for the plaintiff, that it was ill, because the defendant, who is a party to the indenture, shall not be admitted to say, that *Lane's meadows* are arable, because it is contrary to the indenture itself, by which he is estopped to say, that those lands are not meadow; and this appearing on record, the plaintiff need not plead and rely upon it, but shall take advantage of it by demurrer; and the defendant having joined in demurrer, the plaintiff must have judgment.

Hawkins ser-
jeant eontra.

To which it was answered, that the plaintiff demised meadow, pasture, and arable lands to the defendant; now, if the lands called *Lane's meadows* are not arable, then that word must be rejected, for without those meadows there is no arable land at all.

As to the *Estoppel* it cannot be, because the lessee cannot be estopped by the words of the lessor, for the calling the lands by the name of *Lane's meadows*, are the words of the lessor, by which he describes the lands as meadow; it is true, any of the parties to an indenture are estopped to contradict or deny essential words of the deed; but in this case they are only descriptive words of a meadow, which is not really so, therefore this is not contrary to any of the essential words of the deed, especially since the names of lands are taken from reputation in old deeds to preserve the evidence of such lands, which otherwise might be lost, and is seldom regarded by any lawyer in drawing conveyances, for the names of the parcels are entirely left to the clerk.

* P. 312.
† Co. Lit.
45. a.

* *Estoppels* are odious in law, and admitted merely out of necessity, † because they are concluding to speak the truth; as for instance; a stranger joined with the owner of the land in making a lease; now, tho' in reality this was the lease of the owner, yet it is likewise the lease of the stranger by conclusion, otherwise his signing it would be to no purpose, so that it is an estoppel by necessity.

Besides, covenants and agreements are to be taken according to the intention of the parties; and when the defendant covenanted to pay 5*l.* for every acre of meadow he plowed up, it must be intended for every acre which was really meadow, and not for *closes* called *meadows*.

Then it was objected against the declaration, which is, that the plaintiff, as *guardian to the Lord Craven*, made this lease; now, every guardian (except a guardian in socage, which the plaintiff doth not appear to be) is but * tenant at will, and by consequence cannot make a lease for any certain time, or number of years, and if so, then this lease for years is void; and so are all the covenants depending thereon; and therefore the plaintiff hath no right to this action; and all this matter being on the same record, the defendant is not estopped to shew it.

* Co. Lit. 57.
Co. Lit. 352.
Lev. 45.

Eontra.

To this it was replied for the plaintiff, that there are 500 acres of land demised, and certainly some of them must be arable; but the two closes are specially to be meadow by an *acetiam demisit duo prata*

vocat.

vocat. Lane's meadow: and as to the objection, that those are the words of the lessor, and therefore shall not conclude the lessee, it is not so in an indenture, for there the words *grant* and *demise* are the proper words of the lessor: and yet the defendant is estopped from pleading *non demisit*, though it is otherwise in a deed-poll, for there the lessee may plead, that the lessor *nil habuit in tenementis*, &c.

As to the objection to the declaration, (*viz.*) That the plaintiff appears on record to be *guardian*, who is but a tenant at will, and cannot make a lease; this is contrary to the indenture; and the setting him forth to be a *guardian*, is only a description of the person, but doth not prove that he who made the lease is such; he may have a greater interest than barely as *guardian*; therefore the lessee who enjoys this land by virtue of, and under this lease, is estopped to say, that the lessor had no right to make it; and the rent ought to be paid as long as the defendant enjoys the land.

The case was recited by the Chief Justice to be thus: *ff.* The Curia. lessor demands 5*l.* per acre for every acre of meadow plowed by the defendant; and to entitle himself thereunto, lays the plowing the lands called *Lane's meadows*; the defendant pleads the lands called *Lane's meadows*, is not meadow, but arable lands time out of mind; the plaintiff * demurred, for that it is called *meadow* in the indenture * P.313. of lease, and the defendant joined in demurrer.

Now it must be considered, that deeds must be construed according to the intention of the parties, and that the name of *meadow* in this deed is only a description of the land by reputation, and no direct averment that it is meadow; therefore to plead that they are not meadow, is not contrary to the intent of the parties.

It is true, it is said that the plaintiff demised *duo prata vocat. Lane's meadow*; now, though they were not really meadow, yet by this description they would pass in this deed, and therefore it would be too strict, and plainly against the intent of the parties, to construe this to work an *estoppel*.

Now the reservation of the rent of 5*l.* per acre for every acre plowed by the defendant, must be intended for every acre which is *really meadow*, and not for acres called meadow, for the name is but the description of the land, and often differs from the nature of it; for if the nature of the lands should be taken from the name, then all those great improvements of the marsh-lands in *Lincolnshire*, which are still called marsh in deeds, would likewise still be marsh.

It hath been truly said at the bar, that *estoppels* are odious in the law; and it would be very hard that the defendant should be bound by this description; and though all the parties to an indenture are bound by the words thereof in point of law, because they agree to it; yet that must be intended of material words, and not to every minute and descriptive words and circumstances.

Now

Term. S. Mich. 11 Georgii, 1725.

Now if these two closes had been demised, as containing 500 acres, and so mentioned in the indenture, certainly the defendant would not have been estopped to say there were not so many acres.

Cur. was clear of opinion, that the plea was good. *Sed adjournatur.*

Weldon *versus* Buckler.

Scire facias against the pledges in a plaint in replevin, is in nature of a declaration and amendable.

Stra. 611.

* P. 314.

SCI. fa. against the pledges in a *plaint in replevin*, which *plaint* was removed into the court of Common Pleas, where the plaintiff declared, &c. and the defendant avowed the taking, &c. as a distress for rent, and had judgment to have a *return irrepleviable*; and thereupon a writ of error was brought in *B. R.* and the judgment was affirmed, and then a precept was directed to the sheriff to make a return of the goods to the defendant, and he (the sheriff) returned an *elongata*; whereupon the defendant brought a *sci. fa.* against the * pledges, in which he set forth, that he had recovered judgment in the court of Common Pleas, *prout patet de recordo*, &c. *in communi banco*, which judgment was affirmed in error in the court of King's Bench, *prout patet*, &c.

" The defendants plead that the record remains in *C. B.*

" On demurrer special.

" *Reeve pro quer'* argued, that a writ of error upon a judgment in

" *C. B.* removes the record itself, and not only the transcript; for

" execution is awarded by this court if the judgment is affirmed.

" A writ of error returnable in the Exchequer-chamber is different;

" for there the transcript only is removed.

" Then *Braintwaite* serjeant excepted to the *sci. fac.* for incon-

" sistency: it shews that judgment was recovered in *C. B.* *prout per*

" *record' remanen' in C. B. plenius apparet*; that error was brought

" in *B. R.* where judgment was affirmed, *ut per record' remanen' in*

" *B. R. plenius apparet.*

Curia.

" *Cur. Sci. facias's* have been often amended; however, let
" the plaintiff discontinue on payment of costs.

Theed *versus* Starkey.

Covenant to pay taxes on the lands; the rates to church and poor, are not taxes on the lands.

COVENANT against an executor for not paying taxes according to a covenant in a lease made by his testator, wherein he covenanted with the lessee to pay all the *taxes on the lands demised*; and the breach assigned was, for not paying the *rates to the church and poor.*

* 5 Rep. 67.

And upon demurrer to the declaration it was objected, that the breach was not well assigned, because those * rates are personal charges, and not on the land; and for this reason the defendant had judgment.

Wyvel *versus* Stapleton.

UPON an action brought in the court of Common Pleas on a *South-sea* contract, the defendant had judgment; and upon a writ of error brought in *B. R.* that judgment was reversed, and judgment that the plaintiff in error should recover his debt and costs, as he should below.

No costs upon a writ of error where the judgment is reversed.

Ante 68.

Post. 381.

S. C.

* P. 315.

" * *Weldon* moved that the plaintiff in the original action might recover his costs thereof; for this court is not only to reverse the first judgment, but ought to give the same judgment as the court of *Common Pleas* should have given; in which case costs would have been recovered. By the stat. of *Gloc. c. 1.* the Plaintiff is to recover the costs of his writ purchased, which is expounded to intend to all the legal costs of the suit. 2 *Inst.* 288. we do not pray costs of the writ of error, but costs for the delay occasioned by the writ of error. In the case of *Mulcary versus Eire & al'*, *Cro. Car.* 511. 2 *Sand.* 257. Judgment in *Ireland* was reversed, and no judgment given for the damages and costs. There is no case in point.

Reeve contra: No costs were recoverable at the common law upon a writ of error. 3 *H. 7. c. 10.* is the first statute that gives costs on a writ of error: but neither that statute nor 8 & 9 *W. 3. c. 11.* extend to writs of error where judgment is reversed; only when judgment is affirmed, or writ of error discontinued. There is no precedent for costs upon the reversal of a judgment.

" In the case of *Mulcary versus Eire* no costs were given but on the original judgment. If any costs are recoverable in this case, it must be on the statute of *Gloucester*: no other statute has given costs. We are to give the same judgment as *C. B.* ought to have given; and how could they adjudge costs for the writ of error? *Holt Ch. Just.* called a writ of error a revivor of the cause and removal thereof.

Adjournatur.

Wilson *versus* Aldridge.

THE plaintiff obtained judgment at law, and afterwards by a *fieri facias* directed to the sheriff, he levied the debt on the goods of the defendant, who exhibited a bill in equity against the now plaintiff, suggesting that there was more due to him from the plaintiff than he recovered; and so got an injunction to stay the money in the sheriff's hands.

Sheriff ordered to return his writ.

The plaintiff and his attorney, being prisoners in the *Fleet*, move the court against the sheriff, to return the writ of *fieri facias*, and that he might be amerced till he do; and now the court was moved

in behalf of the sheriff for direction what to do; for if he returned his writ he must pay the money, and then the court of Chancery would commit him for not obeying the injunction; and if he did obey it, then the court of King's Bench would amerce him.

Curia.

* The court would not take any notice of the proceedings in P. 316. Chancery, but ordered the sheriff to return his writ, otherwise they would commit him; then the court being desired to help the sheriff to discover what attorney or solicitor carried on the prosecution against him; they refused so to do, because that would be only to enable the sheriff to move the court of Chancery for an attachment; so he had no relief.

Townsend *versus* The Assignee, and several Commissioners of Bankruptcy.

Barriſter at law being joined with another, hath no privilege to change the venue.

A Motion was made to change the *Venue* from *Worcestershire* to *London* or *Middlesex*, for that there would be a very great inconvenience to carry down all the proceedings of the commissioners; besides, one of them is a *barriſter at law*, and two others are attorneys; and it is the constant rule of this court to allow them to change the venue in all transitory actions, either to *London* or *Middlesex*; and the rather in this case, because all the assignees and commissioners are made defendants; and the only evidence which can be against them, is what they have done as commissioners here.

Econtra.

The counsel for the plaintiff allowed the commission to be good, and the proceedings under it; but that the fact on which this action was founded, was done in *Worcestershire*, which was the taking the plaintiff's goods; and the privilege of a counsellor or attorney was never carried farther than when they were concerned in the action in their own right; for where another is joined with them, that privilege is never allowed; besides the bankrupt himself lived in *Worcestershire*.

Curia.

The court would not change the *Venue*, because the plaintiff obliged himself to give evidence only of such matters as happened in *Worcestershire*; and when another is joined in a suit with a counsellor at law, or that it is *in auter droit*, he hath no such privilege as to change a *Venue*.

Cowper *versus* Ginger.

Judgment a-
gainst two,
and the writ
of error
brought by
one, and
quashed; the
defendant
shall have
costs.

Ante 305.

* P. 317.

Of writ of
error coram
vobis residen'.

A Writ of Error was brought by one upon a judgment given in the Common Pleas against two, which writ was quashed; and thereupon the defendant in error moved for costs, as if the judgment had been affirmed; but the plaintiff * in the first writ having brought another writ of error (a) *de recordo quod coram vobis residet*, it was objected that the defendant in error is not intitled to costs, unless that writ is likewise quashed.

But it was argued that a writ of error *coram vobis residen'*, would not lie in this case, because the record was not removed by the first writ of error; for the difference is where the first writ of error abates or is discontinued, there the record is removed, and *error coram vobis* will lie; but where there is a variance in the stile of the court, or the parties are not sufficiently described, there the writ of error must be quashed; and in such case the record is not removed, because it varies from the writ; and consequently the record being not removed, a writ of error *coram vobis* will not lie.

Now in this case the record is fully described in the writ, and there is no manner of variance between the one and the other; and the case is no more than if an action should be brought by one, where it ought to be brought by two, there the action must abate; and the quashing the first writ of error was in nature of an abatement, because the record being sufficiently described in the writ, it abated or was quashed, because it was brought by one, when it should be brought by two; therefore the writ of error being naught, the record was not removed; and if so, *error coram vobis* doth not lie; neither is there any thing inconsistent in the record but *ad damnum ipsius*, when it should be *ad damnum ipsorum*.

Now the first writ of error was quashed for matter appearing on the record itself, and it was never a good writ; and if so the record was never removed, for the first writ ought to be brought by both, because both entered into the recognisance; but it being brought by one alone, he hath no right to examine the errors alone; therefore he ought to have joined the other in the writ, and if he had been unwilling to proceed, he should be summoned and severed.

The Chief Justice said, that if a stranger should bring a writ of error in this court of a judgment in the Common Pleas, the record is not thereby removed, which he compared to the present case, where the writ of error was * brought by one when two ought to join; * P. 318. and they were all of opinion that the defendant in error should have

(a) It lies on a judgment in the King's Bench for any error in the record, as want of an original, &c. or concerning matters of fact, as nonage, death of the party; for error in fact is not the fault of the court; therefore it may be determined by the Judges when the record is before them.

costs, (though that writ was quashed) as if the judgment had been affirmed; and as to the writ of error *coram vobis*, they ordered to search precedents; and afterwards three of the Judges were of opinion that error *coram vobis residen.* did lie; and they grounded their opinion upon the case of *† Walker versus Stokoe*, which was thus: Judgment in trespass against *five defendants*, and a writ of error being intended to be brought, the attorney left a note with the curfitor to make it out between the plaintiff in error, and five more, naming them: *note, that one of the defendants is dead*, and the curfitor made the writ against four, without mentioning him who was dead; the question was whether this was amendable; and adjudged that it was not, because all the parties to the judgment ought to join in a writ of error; it is true this was a plain mistake of the curfitor, whose instructions were right; but yet it shall not be amended, because this writ of error was brought to reverse a judgment; but the statutes for amendment of writs were made for the support of judgments, so that writ of error was quashed.

† 5 Mod. 16.
69.
Carth. 367.

And it was now said by the court, that after that writ was quashed, the plaintiff in error brought a writ of error *coram vobis residen.* wherein the first writ of error was misrecited, it being of a plea in *curia nostra*, whereas the suit was in the reign of the King and Queen, and the writ of error was in the King's time only; for the record was misrecited, and for that misrecital the writ of error *coram vobis* was quashed.

Andrews *versus* Paradise.

Covenant for quiet enjoyment, and that he would do nothing to molest him, &c.

ERROR of a judgment in the Common Pleas in an action of *covenant*, in an indenture to lead the uses of a fine, wherein the cognisor covenanted that the cognisee should quietly enjoy, &c. and that he would not do any thing to molest, hinder or prevent him (the cognisee) or his wife, or any occupiers of theirs, in the quiet possession or enjoyment of the lands, &c. but that the defendant had molested him, &c.

The defendant pleads that he had done nothing to molest, hinder or prevent the cognisee or his wife, &c.

* P. 319.

* The plaintiff replied, and assigned a breach, for that he was seised of a close in such a field, being parcel of the lands now purchased under this fine and conveyance, and that there was a lane leading to this close, through which lane the plaintiff had a way to the close, and that the defendant, *scilicet postea*, did erect a gate across that way, *per quod* the plaintiff's tenant was obstructed in the quiet possession and enjoyment of the aforesaid close, &c.

And upon a demurrer to this replication the plaintiff had judgment in the Common Pleas; and now upon this writ of error brought, it was insisted, that the judgment should be reversed, for that

that the replication was only argumentative of an obstruction, (*viz.*) *Per quod* the plaintiff's tenant was obstructed; whereas the pleading ought to have been certain; besides, nothing appears in this replication, to shew that the setting up the gate was unlawful, for there may be another way, which might make it necessary and lawful to set up a gate; neither is it set forth where, or to what place this way leads, so that the defendant cannot make any answer to it, the replication being too general; besides, this is not an obstruction of enjoying the close immediately, but by consequence; and the plaintiff hath not shewed that he had a right to enjoy this way.

It was argued for the affirmance of this judgment, that the *lane* was left for the use of this close upon the inclosure of a common field, and that it is convenient for the purchaser, and very necessary for preserving the possession; and that this *lane* was constantly used by the occupiers of the close before this conveyance and covenant were made, which is not a covenant as to the right, but to secure the plaintiff in the quiet possession; and the breach being well laid, (*viz.*) That the defendant obstructed the quiet enjoyment by setting up a gate across the lane; the judgment ought to be affirmed.

This appearing to be a necessary way for the enjoyment of this close, then, whether the gate is set up by right or wrong, it is not material as to the defendant; for in either case, if it is an obstruction, it ought not to be erected there.

The judgment was affirmed.

The King *versus* Thead.

BY the statute † 8 *Annæ*, it is enacted, That the officer, &c. may enter the house, &c. by day or by night, where candles are made, and if in the night it must be in the presence * of a constable, and may weigh the candles, the makers whereof must keep just scales and weights where they are made, and permit and assist the officers in using them, under the penalty of 10*l.*

The defendant was convicted upon this statute, for not assisting the officer of excise in weighing the candles; and it was now objected, that the conviction was wrong, because the statute directs, that if the entry is in the night-time, it must be in the presence of the constable; and it is not specified in this conviction, whether the entry was by night or by day.

It is said in the conviction, that the officer entered *lawfully*, which is sufficient, without shewing any circumstances of his entry.

This is a good conviction for 10*l.* upon an information before the justices, for they have a jurisdiction in this case, and nothing appears wrong in it; for it being alledged, that the officer entered *lawfully*, it must be intended right, especially when nothing appears to make it wrong: this objection should come on the defendant's part by pleading.

† 8 Ann. c. 9.
Conviction upon the statute for not assisting an officer of excise in weighing candles.
* P. 320.
Stra. 608.
2 Ld. Raym. 1375.
Ses. Cas. 417.
pl. 331.
2 Stra. 919.
2 Barnard. K. B. 16.
Andr. 84.
Econtra.

The King *versus* Edwards & al'.

Indictment for
a conspiracy
in giving a
man money to
marry a poor
woman inca-
pable of
marriage.
Str. 707.
Sef. Cal. 336.
pl. 265.

THE defendants were indicted, for that they, *per conspirationem inter eos habitam*, gave the husband money to marry a poor helpless woman, who was an *inhabitant in the parish of B.* and incapable of marriage, on purpose to gain a settlement for her in the parish of *A.* where the man was settled; and now it was moved to quash this indictment, because it is no crime to marry a woman and give her a portion; and the justices are not proper judges what woman is capable of an husband, neither have they any jurisdiction in conspiracies.

Econtra.

It was insisted on the other side, that there is a crime set forth in this indictment, which is a conspiracy to charge a parish, &c. and a conspiracy to do a lawful act, if it is for a bad end, is a good foundation for an indictment.

Timberly v.
Child, Sid. 68.
Lev. 62. S. C.
Vent. 304.
S. P.

An indictment for a conspiracy to charge a man to be the father of a bastard-child, was held good, though *fornication is a spiritual offence*; because *B. R.* hath cognisance of every unlawful act by which damages may ensue.

The King v.
Starling, Sid.
174.

So an information for a *conspiracy* to impoverish the farmers of the excise, was held good, &c.

Econtra.

* P. 321.

* To which it was answered, that those were conspiracies to do *unlawful acts*; but it was a good act to provide a husband for this woman.

Curia.

The quashing indictments is a discretionary power of the court, but in this case the defendant hath not shewed any thing to induce the court to quash the indictment; and if the matter is doubtful, the defendant must plead or demur; but indictments for conspiracies are never quashed.

A bare conspiracy to do a lawful act to an unlawful end, is a crime, though no act was done in consequence thereof; but if the fault in the indictment is plain and apparent, it is quashed for that reason, and the party shall not be put to the trouble to plead or demur; suppose there is a *conspiracy* to let lands of 10*l.* per annum value to a poor man, in order to get him a settlement, or to make a *certificate-man* a parish-officer, or a conspiracy to send a woman big of a bastard-child into another parish to be delivered there, and so to charge that parish with the child; certainly these are crimes indictable; but in this indictment it is not set forth, that the woman was likely to be chargeable to the parish.

Finch 80.
cap. 15.

As to the objection, "that the sessions have no jurisdiction in *conspiracies*", the contrary is true; they have no jurisdiction in *perjury at common law*, but by the *statute* they have; and they have no jurisdiction to indict for *forgery*, but certainly they have jurisdiction *de conspirationibus*, and such a person as this defendant is, was punished by indictment at common law.

But

Term. S. Mich. 11 Georgii, 1725.

But in *Trinity-term* following, judgment was given for the defendant, because it was not averred in the indictment, that the woman was last legally settled in the parish of *B.* but only that she was an inhabitant there. See Salk. 174. pl. 1. 2 Ld. Raym. 1167.

Sir John Walrond and Jacob Senior Henricus Van Mofes.

UPON a motion for leave to change the bail in this cause, on that very day it was to be tried by *nisi prius*, because one of them was a very material witness for the defendant; the counsel for the plaintiff objected against it, (*viz.*) That the bail should not be changed, because the principal was run away, and the bail had offered 100*l.* reward to any person who should bring him in; besides, the new bail now offered instead of the former, were bail to an * action upon a *South-sea* contract, in which the plaintiff had a verdict for 13,400 *l.* so the plaintiff in this action cannot tell what they may be worth after the payment of that sum. One of the bail was a material witness for the defendant, and therefore he moved that new bail might be put in, but it was denied. * P. 322.

If the bail surrender the principal, they shall be admitted to put in new bail, and then the old bail may give evidence at the trial; but the bail now offered being bail in another action for a considerable sum, and a verdict against the principal, the plaintiff in this action cannot have timely notice to inquire into their circumstances; therefore the court will not force new bail to the action, but the old ones must stand. Curia.

Nota; At the trial of this cause, a case was cited, that *Trover* lay in *England*, for timber taken away and converted in *Ireland*; and this was by the opinion of the late Chief Justice Holt, tho' it was objected, that it might bring the title of lands in *Ireland* in question, which could not be tried here; but he answered, that as *Trover* was a *transitory action*, it might be brought here for a conversion in *Ireland*; nor shall any incident question which may arise on the same, bar the plaintiff of such action for if it should, then a person being in *England* can have no remedy here when the defendant is guilty of a *trover* in *Ireland*, and comes from thence into this kingdom. Trover will lie here for a conversion in Ireland.

All which was now offered in answer to a question made, whether an action lay here on a contract made in *Holland*; and the case of * *Brown and Hodges* was cited, which was, *trover* was brought here; and upon Not guilty pleaded, it appeared, that the defendant was tenant by the *curtesy* in *Ireland*, and had cut down trees there, and that the reversion belonged to the plaintiff; and upon a case made for the opinion of the court, it was resolved, that in all local actions, as in trespass *quare clausum fregit*; the plaintiff cannot prove a trespass any where else, but where it is laid in the declaration, nor lay it in any other place but where it was done; but that * Salk. 299. pl. 29.

Term. S. Mich. 11 Georgii, 1725.

that it was otherwise in *transitory actions*, as *trover*, &c. therefore the plaintiff might lay the conversion here, and prove it was done in *Ireland*.

Nota also, That in the principal case it was now resolved, that a copy of an agreement *registred in Holland*, and attested by a publick notary there, may be given in evidence for the now defendant, especially since he proved that the plaintiff took out another copy of the same agreement, and would not now produce it; therefore that copy which the defendant had taken out was given in evidence, for it is plain that * the plaintiff knew the agreement, he having taken a copy thereof, so could not be surpris'd.

Nota also; That at the same time the court held, that a plaintiff who was in *Holland* might make *affidavit* there, and get it attested by a publick notary; and that it should be admitted as evidence to hold the defendant to special bail here.

Warren *versus* Confett, antea Term. Mich. 9 Geo.

Nil debet is
no good plea
to an action
of debt on a
penalty.
Ante 106.
Post. 382.

THIS was a writ of error on a judgment in the Common Pleas, in an action of debt for a penalty in not performing an agreement, to receive and pay so much for a transfer of stock, &c.

The defendant pleaded *nil debet*; to which plea the plaintiff demurred and had judgment, for that *nil debet* was no good plea; and that being now the only question, it was argued by *Reeve* for the plaintiff in error, that the plea was good; it is true, it is not so in an action of debt on a bond, because the debt is immediately due; but it is otherwise in an action for a penalty, because the plaintiff could not demand it as a debt or duty; for it is not so without laying some fact antecedent to his demand, to entitle himself to this action; and that must be something *debors* the deed to support the demand; for there is a difference between a bond for performance of articles, where the condition appears in the very body of the bond, and an obligation which hath a defeasance or condition in it not in the body of the obligation; for in this last case a man may have an action on the obligation, without setting forth any matter *debors* to entitle him thereunto; and in such case *nil debet* is no good plea, for the obligation must be avoided by matter of as high a nature, and the defendant is *estopped* by the deed to say nothing is due; but it is otherwise in the first case, for there the debt is not due *prima facie* on the deed, but for not doing some other collateral act.

The cases following were cited to shew this to be the constant difference, (*viz.*) That wherever the debt arises by matter collateral to the lien, it is a good plea; because there arises no estoppel by the deed. When matter of fact and record are mixed, the party is not bound to plead *Nul tiel record*, in an action of debt against a * sheriff or gaoler, for an escape of one in execution; though the plaintiff

11 H. 7. 4. b.
21 H. 7. 14.
45 E. 3. 4. b.
46 E. 3. 1. b.
Broke, Issue
joined 23.

* 1 Sand. 38.

Term. S. Mich. 11 Georgii, 1725.

plaintiff must declare on the judgment, *nil debet* is a good plea, and so it is to an action of debt on the † Stat. 2 Ed. 6. for not setting out tithes; and so it is to an action of debt on * a judgment against an executor upon suggesting a *devastavit*, because the *devastavit* is a matter *en pais* triable: so said by Holt Ch. J. in the case of *Barrett v. Andrews*. Mich. 2 Ann.

† Cro. Car.
* P. 234.
Hut. 109.
Hob. 224.
Lev. 170.
2 Keb. Rep.
347.
Econtra.

It was agreed on the other side, that *nil debet* is a good plea where the action is founded on a collateral matter, and not comprised in the deed; and these are cases of daily experience; as in actions of debt for rent reserved on a lease by deed; and in actions of escape, and in all acts founded on acts of parliament.

But the action in the principal case is entirely depending on the deed, and absolutely founded on the obligation therein, by which the defendant *bound himself in such a penalty*, which is an obligation to all intents and purposes; but where the *lien* arises on the deed itself, there *nil debet* is no good plea, though matter of fact is averred; and wherever an action of debt is brought on an obligation for payment of money, it must be averred that the debt is not paid, which is matter of fact; and yet in such case *nil debet* is no good plea.

But wherever the plaintiff declares on a fact collateral unto, and not arising within the deed, there it is a good plea; but it is a general rule, that *nil debet* is no good plea to any action founded on a specialty or on a record; and it would be of very ill consequence if it should, and particularly in this case; for then the plaintiff must not only prove that this deed was executed, but he must also prove the time of the opening the books, the registering the contract, the tender made by him to transfer, and the refusal of the defendant to accept, &c. and to pay the money; and after all this hardship, if *nil debet* should be a good plea to a specialty, (for so this obligation is) the defendant may surprise the plaintiff by giving a release in evidence, or by proving the obligor was not *compos mentis* at the time of making this obligation; and such difficulties might make persons defend their causes where there is no colour of defence, but only some hopes that the plaintiff might fail in proving some of those things; therefore the law will not admit of such complicated issues, but will always have the issue a single point if possible, and for that very reason will never permit a man to plead the general issue to a specialty; besides the vast difference this issue may make of costs at the trial, which probably may be sworn from 10*l.* (which might be competent costs upon *non est factum*) to 100*l.* upon such a complicated issue as *nil debet*; besides this plea contradicts the deed, and therefore ought not to be allowed more than *nil habuit in tenementis* in an action of * debt for rent reserved upon an indenture; * P. 325. which was never yet allowed.

2 Sand. 344.
Hard. 332.
Salk. 565. pl.
Keilw. 47.

To which it was answered, that though there be some ingenuity to affirm that where the facts on which an action is founded are con-

Econtra for
reversing the
judgment.

Term. St. Mich. 11 Georgii, 1725.

tinued, and appear in the deed itself, there *nil debet* is no good plea; yet a bare affirmation without any one authority to support it, will be of no force.

The court took time to give judgment, because the court of Common Pleas were unanimous in their judgment. See *post*. 382.

The King *versus* Simpson. Monday 16 November.

Mandamus to swear a churchwarden; the surrogate made an ill return. 2 Ld. Raym. 1379. Stra 609. Barnard. K. B. 381. See Ld. Raym. 138.

MANDAMUS to the defendant who was surrogate to Dr. King, Archdeacon of the Diocese of London, to swear one Fane church-warden of Colchester, being elected by the inhabitants, according to the custom of that parish; who returned, that it did not appear to him *per aliquod scriptum*, that Fane was duly elected; and that the Bishop of London had inhibited Dr. King, and any person acting under him to swear this Fane; so he (the surrogate) cannot swear him; and that the *mandamus* did not set forth that Colchester was within the diocese of London.

To which it was answered, that though the *mandamus* doth not precisely mention Colchester to be within the diocese of London, yet when the return mentions that the Bishop of London had inhibited the Archdeacon, &c. that is sufficient to shew the court that it was within his diocese; therefore a peremptory *mandamus* was granted, as it was in the case of the King *versus* Cardigan; for the court said, that where the church-wardens are to be elected by the parishioners by prescription, it shall not be in the power of the parson to hinder them.

The King *versus* White.

Non fuit electus no good return to a mandamus to swear a church-

A *Mandamus* was directed to an archdeacon to swear a church-warden, who was elected by the inhabitants, &c. and he returned *non fuit electus*; this was adjudged to be no (a) good return, and a peremptory *mandamus* was granted.

warden. 2 Ld. Raym. 1379. 2 Stra. 894. 2 Salk. 434. because by Holt it is out of the writ, and evasive. (a) But Ld. Raymond says that this determination was certainly wrong, for the return was a good return, and hath often been made to such *mandamus*, and actions brought upon the return and tried. 2 Ld. Raym. 1379, 1380, 1405. 11 Mod. 174. pl. 16. 12 Mod. 3. That non fuit electus was not a good return, was denied, for the court said, that case had been over-ruled, and they hoped never to hear it cited again. Fitzgib. 195. 2 Stra. 895. Barnard. K. B. 412.

Anonymous.

Anonymus.

A Motion was made by the plaintiff to examine witnesses at a * P. 326. Judge's chamber, they being *mariners*, and now going to sea Seamen who were witnesses, and going a long voyage, the plaintiff moved that they might be examined at a Judge's chamber, but denied. on a long voyage; which was opposed on * the other side, because this would be to deprive the party of the benefit of their evidence by cross examining them at the trial; it is true, such motions have been made where the defendant would put off a trial, or where he desires some other favour of the court; but here it is in the power of the plaintiff to bring on the trial when he pleases; and the defendant cannot bring it on but by *proviso*, and then this motion might be proper.

This motion would have been granted, if the defendant had agreed to it: or if he had desired any favour of the court, it should not be granted unless he would admit the plaintiff to examine his witnesses; but that being not this case, the plaintiff took nothing by this motion. Curia.

The King *versus* Edwards.

UPON a motion for an *information* against the *overseers of the poor* of the parish of *Wadburst*, for removing a poor woman who had the *small-pox* into another parish, and against her will, from the parish of *Wadburst*, where she was an inhabitant; and the sessions refusing to give any relief; Information against overseers of the poor, for removing a sick person.

The *Chief Justice* said, that where a person is visited with sickness by the act of God, he ought not to be removed from the place where he is sick, farther to endanger his health, without an order of two justices; and if such order is made by the justices, knowing him to be sick, an information shall go against them; thereupon a rule was made against the overseers to shew cause, &c. Curia.

And on another day they came to shew cause, &c. and denied the fact alledged against them; and moved that the rule might be discharged, for otherwise this woman, who was really settled in that parish to which she was removed, would upon the trial of this information, be evidence against the parish of *Wadburst*, and gain a settlement there.

But the court was of opinion, that the fact being controverted, and carrying such a barbarity with it, it is requisite that it should be tried upon an information; and then the jury would be proper judges of the truth.

Term. S. Mich. 11 Georgii, 1725.

* P. 327.

* The King *versus* Harris.

Motion to
quash an in-
dictment for a
riot and assault
on a constable
by reason of
an insensible
word.

Curia.

“ **I**NDICTMENT for a riot, at *Hereford* assises, and assaulting
“ *J. S. pett. con'bular. in executione officii*: and upon motion to
“ quash it, it was objected, that this indictment was ill, because it
“ was for a riot in *& super pett. con'bularium*, when there is no such
“ word as *pett.* which was granted on the other side, but that *con'*-
“ *bularium*, with a dash, made the indictment good.

“ The word *pett.* is surplusage, and shall therefore be rejected;
“ and the indictment is good without it, for the other word makes
“ it good: for *con'bularium*, by virtue of the dash, may stand for
“ *constabular*: such dashes have been often used, and the common
“ use is the only rule in governing our construction of them.

Indictment good.

“ *N.B.* As the law proceedings are now in *English*, this case can
“ never happen again. See *Stat. 4 Geo. 2. c. 26. 5 Geo. 2. c. 27.*
“ *6 Geo. 2. c. 6.*

Hunston *versus* Howard.

Want of an
original af-
signed for
error.

Curia.

THE plaintiff had judgment in the court of Common Pleas,
which was now above ten years standing, when the defendant
brought a writ of error in *B. R.* and assigned the want of an original
for error; and now the defendant in error pleaded *in nullo est er-*
ratum, and the want of an original being not yet certified, he moved
to put it off till next term, that he might in the mean time procure
an original to be filed, this being a contrivance of his own attorney
to defraud him.

This motion should have been made before the cause was put in
the paper; but it having the countenance of fraud, it was ruled to
go over upon payment of the costs of the day.

Cuband *versus* Dewsbury.

Prohibition
granted a-
gainst the pro-
ceedings in the
spiritual court,
the defendant
having given
bond to deli-
ver a will
which he got
out of that
court.

PROHIBITION, &c. the case was thus, (*viz.*) The plaintiff
in the prohibition procured a will to be delivered to him out
of the *Prerogative Court of York*, and at the same time entered into
a bond in such a penalty, &c. with a condition to redeliver it again
into that court, at or before such a day, &c. which not being done,
the spiritual court proceeded against him *pro lésione fidei*, and to
have the very will brought into court.

Term. S. Mich. 11 Georgii, 1725.

The defendant pleaded, that he had entered into a bond to redeliver the will, on which they might have a proper remedy: * * P. 328. which plea being rejected by that court, they proceeded against him there; and now he moved for a prohibition, upon a suggestion that all suits upon or concerning bonds are determinable only at common law.

Bootle contra: This motion comes too late, there being a sentence Econtra. and excommunication; the intent of the libel plainly appears to be for a redelivery of the will, and not for the recovery of the penalty of the bond: for that the witness to the bond was dead, and probably if it was put in suit, they might not recover; besides, the penalty might not be sufficient to make amends for the damages sustained by those who were interested in the lands conveyed by this will, by not having it produced; therefore it is necessary that they should have a power to enforce him to bring it in.

Besides, it is the * election of the party either to put the bond in * Cro. Eliz. suit, or to sue in the spiritual court; and now some instances were 607, 844. shewed in parallel cases.

¶ A man forged an *ordination*, and being prosecuted in the spi- Lev. 131. ritual court, he pleaded that *forgery* was triable at common law; Sid. 217. the court rejected that plea; and thereupon the plaintiff moved for a prohibition, but it was denied, because the prosecution was in order to a deprivation.

So where the suit was in the spiritual court for taking the *bells* Sid. 281. out of the steeple; the defendant pleaded the general pardon; and W. Jo. 230. that plea being likewise rejected, the plaintiff moved for a prohibition, and that was denied, because the suit being *pro salute animæ*, was not pardoned.

And in * *Gardner's* case, where the executors gave bond for pay- * Gardner's ment of a legacy, *Judge Doderidge* was of opinion, that the obligee case, 2 Roll. might sue for the legacy in the spiritual court, or at common law Rep. 160. upon the bond; for that the taking the bond had not altered the nature of the legacy.

" That case in 2 *Roll. Rep.* 160. is not law; for the bond satis- Curia.
fies the party, by extinguishing the legacy. *Adjournatur.*

The King *versus* Brereton.

Information for a libel laid in the city of *Chester*, which being Information a local offence, and issue joined in this court, could not be tried for a libel laid there, but in the *county of the city*; therefore it was sent by *mittimus* in the disjunctive, (viz.) directed to the *Chamberlain* of the county palatine of *Chester*, with Scriptis seu direction, that he should transmit it to the Mayor of the city of *Chester*, in order to have it tried in the county of the city before scribi causavit, him. not good.

* P. 329. " The writ from the *Chamberlain* to the Mayor (after issue tried) commands the mayor to send the record back to the *Chamberlain* for him to appoint a day for the appearance of the parties, in order for their receiving judgment.

* The *Chamberlain* accordingly transmitted the record to the Mayor, who had the cause tried, and a verdict against the defendant; and then the mayor, who was the judge of the court returned the record, which return was certified by the *Chamberlain*.

And now it was moved by *Fazakerly* in arrest of judgment.

" The first exception was, that it appears by the record that the day is appointed by the Mayor; which is therefore void, because done without authority.

" 2d Exception, It does not appear that the *Chamberlain* of the county palatine of *Chester*, is *Chamberlain* of the city of *Chester*.

Then as to the information, the fact is laid very incertain, for it is, that the defendant *scripsit, fecit, & publicavit, seu scribi fecit, & publicari causavit*, which is very incertain, and no proper defence can be made, because it is in the *disjunctive*, therefore where an indictment was for *making, or causing to be made*, a bill of lading, this was held ill, because in the *disjunctive*.

Then it sets forth, that the defendant made *quendam libellum in quo continentur hæc scandalosa verba, &c.* setting forth some words, but not the whole pamphlet, which he should have done, or averred, that there were no words in it to qualify those which were incertain.

" 1st, The Mayor being judge has a right to appoint the day; all the precedents warrant it. Besides, should this objection prevail, we may have a new *mittimus* or a *ve. fa. de novo.* *Rol. Abr.* 285. pl. 4.

" 2dly, The *Chamberlain* of the county palatine is *Chamberlain* of the city of *Chester*, for the city of *Chester* is part of the county palatine; and he has jurisdiction within the city of *Chester*, by 33 H. 8. c. 13. 1 *Inst.* 211. There are but two precedents of actions laid in the county of the city of *Chester*; and in both these precedents the *mandamus* is directed as here. *Tr. 13 W. 3. Merchant Taylors Company v. Baynton. Mich. 8 Ann. Henshaw v. Tickel.*

As to the objection, that this information is in the *disjunctive*: it is true, a man ought not to be punished where there is any incertainty in the crime committed; but a *disjunctive* doth not always make a different crime, but sometimes it is explanatory, and therefore writing a libel, or causing it to be writ, is the same offence; and if so, this information is good; it is like an indictment on the statute 5 Eliz. that a man exercised *artem seu mysterium*, and that was held no fault.

And

Term. S. Mich. 11 Georgii, 1725.

And as to setting forth the whole libel, or the contents thereof, it is not material so to do, for if it should, most informations would be set aside for that reason.

"All precedents warrant this form of setting out the libel; for if there is any other part of the libel which may excuse the defendant, he may take advantage thereof upon the trial.

On the other side it was answered, that this court will take judicial notice of the ministerial officers of all counties; * and if the Chamberlain hath a command over the whole county palatine (as certainly he hath) the court will intend, that this return was made by him as Chamberlain of the county palatine, and no other shall be intended. Continuance of the argument for the plaintiff. * P. 330. 4 Inst. 212.

And that this record is well returned, and the day given by the mayor (who was the judge that tried the cause) to hear the judgment of this court; and if no day had been appointed on the roll, the court might appoint a day in entering the continuances until a plea or demurrer. Rol. 485.

And lastly, there is no uncertainty in the fact, for to write or cause to be written, is the same offence.

"As to the first and second exceptions, if the precedents are so, we cannot vary now; the city is part of the county palatine. Curia.

"Thirdly, writing and causing to be wrote are two different acts; and no information is like this. On the Stat. of H. 6. an indictment for erecting *cottagium five tenementum* is ill, as to the in-

dictionment on 5 Eliz. c. 4. it is good, because that is not the charge. If the crimes were the same, yet the indictment ought to be certain. Fourthly, the information is good notwithstanding this exception. Adjournatur.

Sparks versus Keeble.

IN trespass *quare vi & armis clausum fregit & intravit, &c.* and took away the plaintiff's hops, and destroyed his hop-poles, &c. The defendant, as to the force and arms, pleaded Not guilty, and justified the entry, for that the place where the trespass was supposed to be done was his (the defendant's) own ground, and that he entered and distrained the poles *damage feasant*. Plea not answering the declaration, not good.

And upon a demurrer to this plea it was insisted for the plaintiff, that though the defendant might distrain the poles, yet he could not destroy them; and in this plea he made no answer to the destroying them, as he ought.

No justification can be good for destroying a thing distrained, for all distresses ought to be safely kept; so the defendant having not answered that part of the declaration, judgment must be for the plaintiff. Curia.

Arthur

* P. 331.* Arthur *versus* Commissioners of Sewers in Yorkshire.

Certiorari is
not a writ of
right, but may
be granted at
discretion.
Stra. 609.
Fortesc. Rep.
374.

THE plaintiff was chosen clerk to the commissioners of sewers at a meeting, by a majority of forty-three then present; and afterwards, at a second meeting, they made an order to turn him out, and they chose another; and now the plaintiff moved for a *certiorari* to have the order returned, which was opposed by the commissioners, who offered to read *affidavits*, that the plaintiff was surreptitiously chosen without due notice given to the majority of the commissioners, who formerly made an order, that the commissioners should always give thirty days notice of every meeting; but when this clerk were chosen there were but six days notice given, on purpose to surprise the rest of the commissioners in the choice of the plaintiff, for great part of the commissioners could not possibly be there.

On the other side it was said for the plaintiff, that the court would not inquire into the merits of his election till a *certiorari* was granted and returned; for since the commissioners have power by the statute to elect a clerk, and the plaintiff is elected by them, he is entitled to several perquisites by virtue of such election; and the commissioners having thereby executed their power, they shall not be permitted to recall their own act, for if they should, they might chuse a new clerk at every meeting, and turn out the other, and there will be such a contest amongst them as may render the office precarious; and for this reason the court would not permit the *affidavits* to be read, but would grant a *certiorari*, which was a writ of right.

But this was denied by one of the judges, who said, that a *certiorari* was not a writ of right, for if it was, it could never be denied to grant it, but it hath often been denied by this court, who, upon consideration of the circumstances of cases may deny it, or grant it at discretion; so that it is not always a writ of right.

It is true, where a man is chosen into an office or place, by virtue whereof he hath a temporal right, and is deprived thereof by an inferiour jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiæ*, because he hath no other remedy, being bound by the judgment of the inferior judicature.

* Therefore in this case a *certiorari* was granted, but the return thereof was quashed for some irregularity; and thereupon the court was moved for another *certiorari*.

One of the judges opposed the granting it, because the removal of the orders by virtue of the *certiorari* would not determine the right of

Term. S. Mich. 11 Georgii, 1725.

of the plaintiff, which was the reason of quashing the return of the former *certiorari*.

But by the other three judges the *certiorari* was granted.

The King *versus* Serle.

MANDAMUS to the defendant, late Mayor of Penryn in Cornwall, to swear Peter Pindar mayor, he being duly elected. Mandamus to swear a mayor, &c.

The defendant made this return, (*viz.*) That this town was incorporated by letters patent made by King Jac. 2. and to consist of a mayor, and so many burgesses; and that they were to choose a mayor every year out of the capital burgesses who is to act as mayor for a year, and until another was duly chosen; that on St. Matthew's day (being the day appointed by the charter) and in such an year, one Penballor was chosen and sworn mayor, and died within the year; and that after his death, the corporation proceeded to a new election according to their power, so to do by virtue of the letters patent, who chose the now plaintiff mayor, who for some time acted under this election.

That afterwards an information in nature of a *quo warranto* was brought against him, for usurping this office of mayor, *prout patet per eandem* (instead of *prout patet per recordum*), and that he justified by virtue of the said election, on which justification two issues were tried; the first was, if the plaintiff was duly elected mayor; the second was, if he was duly sworn into the office, and the first issue was found for him, and the second against him; and thereupon a general judgment of amotion or *ouster* was given against him, (*viz.*) *quod petrus Pindar nullo modo se intromittat, &c. sed ab eisdem & eorum quolibet penitus excludetur & amovetur*, but doth not say, that this judgment was given upon this information.

And now he moved for a *mandamus*, and the defendant pleaded this judgment of *ouster* against granting that writ; but it was insisted for the granting it, that though the judgment of *ouster* was entered against him; yet as his right to be mayor, was by virtue of his election, and the right of exercising * that office was by virtue * P. 333. of his being sworn; so the judgment against him for usurping the office not being duly sworn, can be no bar to his exercising it, when he is duly sworn.

The judgment in this case, is like where several issues are tried, 2 Salk. 432. and some found for the plaintiff, and some for the defendant; it is true in such case, the court will give leave to enter judgment for the plaintiff; but they will likewise give the defendant leave to take advantage of the issues found for him, as they appear in the same record.

This may be compared to an attainder where the heir or executor of the person attainted brings a writ of error, tho' in such case he can neither have executor or heir; yet the attainder cannot be pleaded in bar to the writ, for *non valet exceptio ejusdem rei cujus petitur dissolutio*; so in the present case to return a judgment of *ouster* for not being sworn as a cause why the plaintiff should not *now be sworn*, is as much as to say you are not sworn; therefore you shall never be *sworn*, because you exercised this office before you was *sworn*.

It may likewise be compared to a *deed of feoffment*, where the feoffee enters before *Livery and seisin* made by the attorney who was to make it, he (the attorney) shall never say, that he is not obliged to make livery, because the feoffee entered before it was made.

It is true, the plaintiff was not duly *sworn* at the time he was elected, but if he could not be *sworn* afterwards, then the charter would be lost, because he is not mayor, not being sworn, and there is no mayor to act in the mean time.

If a special information should issue against this mayor for not being *sworn* and he is found guilty, certainly he might be sworn afterwards, which is the same case as appears on this record; and most of the cases of this nature are for *male-feasances* after elections.

It is to be considered, that there is a writ of *quo warranto clamat*, &c. and an information in nature of a *quo warranto* as in this case, that the judgment in the one is final, it being a civil suit, and the King's writ of right; but it is not final in an information in nature of a *quo warranto*; but if it was so generally, yet it could not be so in this case, because the plaintiff's right appears in the same record; therefore a general judgment of *ouster* ought not to be entered, but it should be with a *salvo jure*, as in the King's case, when judgment is given against him in a *quo warranto*; it is true, where the judgment is for the King against the * very liberty claimed, and this upon an information in nature of a *quo warranto*, there it is final.

But in the present case, the right of the plaintiff appears on the very face of the record; therefore though the non-swearing may be a good return for not admitting the plaintiff to act, if he should bring a *mandamus* for that purpose, and to have the *insignia* of the office delivered to him; yet it cannot be a good return to this *mandamus*, which is only to swear him.

It is true, he hath already exercised the office of mayor, but that may be compared to the case of a copyholder, who enters before admittance, yet he may be admitted afterwards; it is likewise true, that a *mandamus* hath been denied to swear a mayor after the * year; but that was where he had no right to hold over; and therefore could not be sworn where his right was determined, which is not this case, for here was a power by the charter to hold over; therefore the judgment of *ouster* (though entered generally) should be considered

Co. Ent. 549.

2 Inst. 282.

* P. 334.

Cro. Jac. 160.

Yel. 190.

1 Inst. 56.

* Sid. 33.

Term. S. Mich. 11 Georgii, 1725.

considered as a judgment *quousque*, for the ousting a man from a liberty, or the seising thereof is quite different from the ousting one from the officiating in an office.

Besides, a *mandamus* gives no right, but puts a man into possession, which may be afterwards disputed by every man who hath a right; and therefore a peremptory *mandamus* was desired.

It was argued for the defendant, that all the right of the plaintiff must be lost by this general judgment of ouster; and in this case the election and swearing being but one entire justification, and one of them being found against the plaintiff, judgment final shall be given against him, and he shall not afterwards be admitted to claim any right by virtue of an election precedent to such judgment, because that judgment hath extinguished all his right. Econtra.

Now the judgments, both in the writ of *quo warranto*, and in the information in nature of a *quo warranto* are the same which appears in several entries, and they differ only where the party is ousted from the franchise, and where it is seised by the King; for where it is entered with a *salvo jure*, there the judgment must be against the King. 2 Rol. Rep. 46, 92. Raft. Ent. 540. Co. Ent. 527, 537, 540, 559.

So unless the plaintiff can shew some new title, he hath no right to be sworn, nor can he be sworn by virtue of any right he claims by the former election, because all that right is determined by this judgment.

The question is, if *Pindar* hath still a subsisting right to enjoy the office of mayor, and that he hath not, the defendant * returned * on this *mandamus*, the constitution of the corporation, and to choose a mayor yearly, who was to act for a year, and until another was duly chosen; they likewise return the information, and the judgment of ouster, and rely on the same, the year being out; so that the principal question is, whether this judgment is a good bar to him from being now sworn. Curia. P. 335.

It is true, it appears on the same record, that *Pindar* was duly elected, though not sworn; it seems, that by that means he should be precluded from this office; but the judgment given in this case is the constant judgment in such cases, and the court must take it to be good whilst it is unreversed; therefore taking it abstractly as the court must do, without considering whether it is a proper judgment, or not, it is as full an amotion as can be, and therefore *Pindar* is entirely excluded whilst this judgment stands in force: for which reason a peremptory *mandamus* was denied.

The

The King *versus* Beecher & al'.

Mandamus to
the justices to
sign a poor-
rate.

Comb. 422,
478.

5 Mod. 275.

6 Mod. 229.

Foley 36, 37,

368.

2 Sef. Caf. 65.

pl. 68.

THIS was a motion for a *supersedeas* to a *mandamus* to be directed to the justices of peace to sign a *poor-rate* made by one part of the parishioners only, by which rate part of the parish were not charged, upon pretence that it was extraparochial; and there was another rate made by the majority of the parishioners, by which that part of the parish not charged was thereby charged, which last rate was signed by two justices; so if this *mandamus* should be directed to them to sign this rate, it would contradict what they had already done by signing the other rate, which ought to be determined upon an appeal, before a *mandamus* should be granted for the signing another rate, for otherwise there might be a double appeal.

Curia.

The court held, that if a *mandamus* was directed to the justices to sign this rate, it would not be contradictory to that which was already signed, nor to themselves, because the contest is between the parishioners in which the justices are not concerned, therefore they ought to sign this rate, and not contest the right, it being a question of fact between the parishioners, whether this place not charged in this rate, but charged by the other rate, is extraparochial, or not, which is fit to be tried in a feigned issue.

* P. 336.

* The King *versus* Robinson.

Mandamus to
proceed to the
election of a
mayor.

See Stra. 555.

MANDAMUS directed to the mayor and aldermen, &c. of &c. to proceed to the election of a new mayor, who was to be chosen out of the aldermen; the return was, that there were no aldermen, &c. And now the court was moved for an attachment against the defendant, for that this was rather a banter than a return.

Curia.

If there are no aldermen, yet an attachment must not go, but the plaintiff may have his action for a false return, or he may traverse the return, if false; so there is no colour for an attachment; but afterwards, upon farther consideration, a rule was made to shew cause, &c. for if it appears this was a frivolous return, and purposely made to avoid the justice of the court, an attachment shall go.

Anonymous.

Anonymus.

THE plaintiff obtained judgment against the principal for 2318l. Bail shall pay which judgment was contested by him so far as he could, interest from the time the even to an affirmance in the house of Lords, and afterwards the judgment was plaintiff obtained a judgment upon a *sci. fa.* against the bail; and had against the question now was, whether they should pay interest from the the principal. time the judgment was had against the principal; they offered to See 2 Bur. Rep. 1099. pay the principal sum and costs; and it was insisted for the plain-S. P. tiff, that he ought to have the whole, and the court inclined to that opinion.

The King *versus* Chandler.

THE defendant was indicted, for that M. S. being with child *de illegitimo fœtu*, begotten by him (the defendant) he secreted her so as she could not be had or found to give evidence for the parish against him; to which indictment the defendant demurred, because there cannot be an *illegitimus fœtus*; and for that reason the defendant had judgment, for every *fœtus* is legitimate till born, for the parents may marry before the child is born; and if so, then the child is legitimate. Indictment for secreting a woman big with illegitimo fœtu. 2 Ld. Raym. 1368. Stra. 612. 2 Sef. Caf. 5. pl. 8.

* The King *versus* Trinity Parish in Chester.

* P. 337.

TWO justices made an order to remove the father and mother, and John, Elizabeth and Sarah, their children, from the parish of, &c. to the parish of, &c. and it was now moved to quash it, because it did not set forth the respective ages of the children, for they might be apprentices, or serve for a year, and so gain a settlement elsewhere; and for this reason it was quashed as to the children, but it was good as to the father and mother. Order for removing children, and did not set forth of what ages they were, quashed. Sef. Caf. 70. pl. 74. See Sef. Caf. 82. pl. 84. Id. 84. pl. 86. S. P.

The King *versus* Nicholls.

A Motion being made for leave to file an information against the defendant Nicholls, who was mayor of Stafford, and a justice of peace, for his neglect of publick justice in denying a warrant to the prosecutor, who was beaten by T. S. a rule was made to shew cause, &c. Information against a justice of peace for denying to grant his warrant, refused.

And now it was moved to discharge that rule, because the mayor had several people then before him to be examined concerning a

riot which happened on that day; and it being late at night, he desired them to come the next day, which is the denial of which the prosecutor now complained.

And thereupon the rule was discharged, because the mayor had done what justice he could; and the intent of the procuring this rule was to bring him into disgrace, and to inflame the corporation against him; so the prosecutor was ordered to pay the costs of the motion.

The King *versus* The Mayor of Monmouth.

Information
for beating
the informer.

THIS was likewise a motion for leave to file an information against the defendant for beating the informer, who gave no other provocation, than saying to him, who kept an ale-house, *Mr. Mayor, draw me a pot of drink*; but it being the last day of the term but one, the court would make no rule to hang over a magistrate's head a whole vacation, so ordered it to be moved the next term, if they thought fit.

* P. 338.

* Swetnam *versus* Archer.

Prohibition
where the suit
was for seats
in a church.

PROHIBITION to the spiritual court, where the suit was for a faculty for a seat in, &c. (erected in a vacant place of the church and at his own charge) annexed to his family. The defendant opposed the granting the faculty by pleading that the pew was not erected in a vacant place; that the pews in the church were pulled down without her consent; and that this pew was erected in the place where she before had a pew appurtenant to her messuage of S. which she always used to repair; which plea being rejected by that court, the plaintiff now moved for a prohibition, on a suggestion that all prescriptions and customs are triable only at common law; and that the defendant claims the said pew having always repaired the same: and on an affidavit of the truth of the suggestion, and of her pleading the same below, *Noy 129. Cro. Jac. 366.* which was opposed, for that the church was new built by the parishioners, and for that reason there could be no prescription to the seats, but that they were in the gift of the bishop; so a consultation was prayed. *2 Bulstr. 150.*

The plea tendered by the defendant was such as could not be tried in the spiritual court, because they cannot hold plea of the inheritance of the seats, nor of any thing which concerns the freehold.

“*Cur.* By the suggestion it appears that the prescription was pleaded below: which tied up the hands of the ordinary from any further proceeding; for the spiritual court cannot try a prescription.”

Term. S. Mich. 11 Georgii, 1725.

“scription. The ordinary hath a right to dispose of all vacant seats in
“the isle: but he cannot intermeddle with a temporal right. The
“suggestion is, that the pew was pulled down without the defen-
“dant’s leave; which cannot devert her of her right, though it be
“executed at the charge of the parish. Here appear both the cau-
“ses of prohibition, 1st, want of jurisdiction, and 2^{dly}, want of
“trial. Let there be a prohibition.

Archer *versus* Swetnam.

MOTION for a prohibition to the spiritual court, the plain-^{Prohibition}
tiff being prosecuted there, for saying, *he would not be of the* denied.
communion of the church of England, upon any consideration, for he
believed if he was, he should be damned: and the reason offered for
the prohibition was, because the libel was for a contempt against
the *common prayer book*, whereas this was not such an offence.

The court was of opinion, that though it is not an offence against ^{Curia.}
the *common prayer book*, yet it is certainly of spiritual cognisance,
therefore the prohibition was denied.

Brown *versus* Coombs.

AN objection was made against the bail in this cause, for that it ^{An attorney}
is against the rule of this court to take an attorney bail. ^{may be bail.}

It is very true, there was such a rule, but the intention of
making it was, that an attorney shall not be taken as good bail,
merely by his being an attorney; but when he is responsible, and
justifies, and is an house-keeper, then, tho’ he is an attorney, he
is good bail.

The King *versus* The Church-warden of Rotherhith
in Surrey.

UPON a motion for a *mandamus* to the new church-wardens * P. 339.
and overseers of the poor, to make a *rate* to re-imburse the ^{Mandamus}
old ones the several sums by them expended for * the maintaining ^{not granted to}
the poor the last year, is denied; it having already been resolved ^{church war-}
in ^{dens, &c. to} *Tawney’s* case, that a *mandamus* cannot be granted to the new ^{make a rate}
overseers to make a rate to raise money to reimburse the old over- ^{to reimburse}
seers, but only to raise money for the relief of the poor; for so is ^{the old}
the act of parliament expressly, and must be pursued, and an over- ^{church-war-}
seer is not bound to lay out money till he hath it; if he doth, he ^{dens.}
must make a new rate for relief of the poor, out of which he may ^{† Salk. 531.}
retain so much as will pay himself. ^{6 Mod. 97.}

D E

Term. Sanct. Hill.

Anno 11 Georgii, 1725.

Strong *versus* How.

An attorney
ordered to de-
liver deeds,
though not
entrusted with
him in his way
of business.
Stra. 621.

THE defendant, who was an attorney, had deeds delivered to him by the plaintiff, and gave a note under his hand to redeliver them safe, whole and uncanceled to the plaintiff upon demand, which not being done, the plaintiff moved for an attachment against him, and obtained a rule for the defendant to shew cause why that writ should not go.

* P. 340.

Afterwards it was shewed for cause, that these deeds were delivered to the defendant by the order of his (the plaintiff's) brother to be laid before counsel for his opinion, and did not come to his possession as he was an attorney in the way of his business; and that he delivered the deeds to the counsel, who delivered them to a person who lent his brother * 200*l.* on a mortgage of his estate, so that he (the defendant) could not have them back again; and therefore the court will not grant an attachment for not returning them when it is impossible it should be done, especially since, if the plaintiff hath any right to the deeds, he may recover them in an action of trover, or by a bill in equity.

Curia.

It is an established rule of this court, that wherever deeds or writings come to an attorney in the way of his business, to compel him to redeliver them to the person of whom he received them; for as he is entrusted with them, the court will compel him to execute the trust, he being subject to the justice of this court; and it is not material, whether he is an attorney of this court, or not, if he practises therein; and the other courts have the same power over the attornies of this court; and they have gone so far as to compel a counsel to deliver up the writings entrusted with him.

As to suing for them, it would be very inconvenient to put the deliverer to a suit either at law, or in equity; for he may not be able to defend his possession for want of them.

Whereupon the rule was made absolute.

Term. S. Hill. 11 Georgii, 1725.

Anonymus.

THE practice of *B. R.* is, that where judgment is obtained against the principal, in such case, the bail may surrender him at any time before the return of the first *scire facias*, where it is afterwards returned *scire feci*, or at any time before the return of the second *scire facias*, where two *nihils* are returned.

Bail where they are discharged upon the surrender of the principal.

See ante 131.

And if the plaintiff proceeds by action of debt on the recognisance, the bail may surrender the principal within eight days after the return of the writ.

Now the principal case was an action of debt on the recognisance against the bail, and the writ was returnable, the *essoin*-day of the term, and the principal was surrendered, and an *exoneretur* entered on the bail-piece the fourteenth day of *January*; so it was moved, that the bail might be discharged, and they were discharged accordingly.

Matthias Carter's Case.

ON *Thursday 4 Febr. 1724.* one *Matthias Cater, gent.* to the *Earl of Suffolk*, was by order of the house of Peers committed to *Newgate* on proof of his being guilty of procuring and selling written *protections*, from and in the name of that *Peer*, to several persons, to the great damage of * their creditors, and in breach of the standing orders of that house; and was also found guilty of an unlawful combination with others to charge falsely on their oaths certain persons for speaking scandalous and insolent words, reflecting on the house of Peers, and was sentenced to pay a fine of twenty nobles, to suffer three months imprisonment, and to stand twice in the pillory; all which was done accordingly without any trial by jury.

The defendant was committed to Newgate for selling written *protections*.

* P. 341.

King & uxor *versus* Basingham.

ASSUMPSIT, &c. in which the plaintiff declared for money lent by the husband and wife, &c. and that it was not paid, *ad damnum ipsorum*.

Where husband and wife may declare *ad damnum ipsorum*.

After a verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was ill; for it is plain the wife can have no property in the money of the husband; besides, by this sort of declaring the right would survive to the wife, whereas it ought to go to the executors of the husband.

Ante 199. S. C. Cro. Jac. 644.

It is true, where there is an express promise made to the wife, for some special act by her done, and where the duty would survive,

Salk. 114. pl. 2.

Term. S. Hill. 11 Georgii, 1725.

they may declare *ad damnum ipsorum*; as where they declared, for that the defendant was indebted to them for work done by the wife in making a peruke for the defendant; he promised to pay, but had not paid, *ad damnum ipsorum*; this was held well enough; but in trover by husband and wife, in which they declared *quod cum possessionati fuerunt, &c.* and that the defendant had converted, &c. *ad damnum ipsorum*; this was adjudged ill after a verdict, because both the possession and property was in the husband.

Salk. 114.
pl. 1.
See Cro. Jac.
77.

Econtra.

Salk. 117.
pl. 8.
Ld. Raym.
368.
2 Mod. 207.

Cro. El. 61.
Sid. 25.

Hilliard v.
Hambridge,
Allen 37.

* P. 342.

Curia.

It was insisted for the plaintiff, that if this declaration can be supported by any intendment, it ought to be made in favour of the plaintiff's right after a verdict; now this may be the money lent by the wife before the marriage, and the promise made to her and the husband after marriage.

If this had been an action of *covenant*, on a covenant made to them, it would have been good; and so it would in a *joint action* brought by them for rent on a lease made to them, or in action of debt on a bond made to them; so where the wife paid a marriage-portion, and a promise was made to her to repay it; and the action was brought by her and her husband; so where an action on the case was brought by the husband and wife against an executor, upon a promise made by * his testator after coverture to pay 8*l.* per ann. to the wife during her coverture; after a verdict for the plaintiff, it was moved in arrest of judgment, that the action should be brought by the husband alone, because the whole benefit was to him, for that the promise was made since the marriage; but adjudged that the husband alone might bring the action or join his wife.

The court inclined against the plaintiff, for it being laid *ad damnum ipsorum* made the declaration ill; and so it was adjudged in Cro. Jac. 479.

Myer versus Yellop.

Attachment cannot be granted for a rescous before the sheriff hath returned the writ.

Ante 110.
Caesar v. Holt
S. P.

AN attachment was granted upon *affidavits* made against the defendants for a *rescous*, and this was before the sheriff had returned his writ, which being contrary to the old practice in such cases, it was set aside.

Read versus Marshall.

Where the wife need not be joined with the husband in the action.

THE plaintiff brought an action against the defendant for entering his house, taking away his goods, and for beating his wife, and had judgment by default; and upon a writ of inquiry, the jury gave 100*l.* damages; and now the defendant moved in arrest of judgment, for that the wife ought to be joined in this action.

Term. S. Hill. 11 Georgii, 1725.

To which it was answered, that *beating the wife* was only laid to aggravate the damages, and the court seemed to be of that opinion.

Cro. Jac. 501,
502, 538.
Russell & ux.
v. Corne,
Salk. 119.

Anonymus.

UPON a motion in arrest of judgment in an action of debt upon a bail-bond, wherein the obligor was bound *in quadrant libris*, conditioned that T. S. should appear on the return of the writ; the objection was, that the word *quadrant* was insensible; it is true, if the *condition* had been for payment of money, so that it might explain what was meant in the *bond*, it might be good; but where the *bond* is single, or the *condition* is for doing some collateral act (as in this case it was) which doth not explain *what sum* is intended in the bond, there it is void.

The defendant was bound in a bail bond in quadrant libris, &c.

Cromwell v. Grunsden,
Salk. 462.
2 Lev. 166.
5 Mod. 281.

* To which it was answered, that it may be well on the roll; thereupon the court stayed all proceedings till the roll was brought in, and said, tho' the condition of this bond was collateral, yet the bond being made according to * the statute, by which it is enacted, that none arrested by process, &c. in which the true cause of action is not expressed, and for which the defendant isailable by virtue of the statute † 23 H. 6. shall be forced to enter into a bond, with sureties for appearing, in any sum exceeding 40l.

* P. 343.

* 13 Car. 2.
cap. 2.

† 23 H. 6.
cap. 10.

Now the condition of this bond being for appearing, &c. that may explain what is intended by the word *quadrant* in the bond, (*viz.*) 40l. according to the statute.

Cotton *versus* Owen.

IN *replevin* for taking his goods, the defendant avowed, and justified the taking *damage-feasant*; the plaintiff replied, that the goods were there, &c. by virtue of a *demise* made to him by the avowant himself, and that he entered and was possessed, &c. The defendant rejoined, and traversed the *possession*; but gave no answer to the *demise* set forth in the replication to be made by himself, for which reason the plaintiff demurred, and the defendant joined in demurrer; and it was insisted for the plaintiff, that since the traverse of the possession was immaterial, and nothing said as to the demise, the plaintiff ought to have judgment; and accordingly judgment was given for him.

Where the rejoinder did not answer the replication.

* Hob. 81,
11 Rep. 10.

Perry

Perry *versus* Kirk.

A latitat may be sued out before cause of action, but the plaintiff cannot declare before the cause of action doth arise.

Ventr. 28.
Barnard. K.
B. 57. both
S. P.

* P. 344.

IN an action brought against the defendant for goods sold and delivered, but the plaintiff declared in *assumpsit*, and in his declaration he laid several counts, and also declared on a *promissory note*.

Upon *non assumpsit* pleaded, the parties were at issue, and at the trial of the cause, the counsel for the defendant insisted on a special agreement, and that the defendant did not owe the plaintiff any thing at the time of the arrest; and for that purpose he insisted, that the plaintiff might produce this note, for he only proved the sale and delivery of the goods, whereas he ought not to proceed on that count and no other.

* Thereupon he produced the note dated 18 April 1724. which was for the payment of 60*l.* and then the counsel for the defendant produced a receipt under the plaintiff's hand, by which it appeared, that he (the defendant) was to have *six weeks* time from the date of the note to pay this money; therefore the plaintiff cannot maintain this action, because the process against the defendant bears teste 18 May, so the six weeks were not yet expired.

To which it was answered, that the declaration was of *trinity-term*, which was above six weeks after the date of the note, and that is the only thing of which the court ought to take notice; for the original process was only to bring the defendant *in custodia marescalli*, which may well be before the cause of action.

Curia.

The court held that to be the constant difference; for the plaintiff may sue out a *latitat* before the cause of action, but he cannot declare till after the cause of action doth arise.

Ancell *versus* Sloman.

The plaintiff who sued in forma pauperis shall pay no costs on a nonsuit.

* 23 H. 8.
cap. 15.

Curia.

THE plaintiff being admitted *in forma pauperis* by this court, brought an action against the defendant, in which he was nonsuit, and was taken in execution for the costs of this nonsuit, having an estate fallen to him since; and now it was moved, that he might be discharged, because by the * law, he who sues *in forma pauperis* shall pay no costs, but shall suffer such punishment as the court shall think fit.

The court was of opinion, that if the plaintiff was a *pauper* when the cause was tried, he shall not pay costs, and the descent of lands to him shall not have relation to that time; so a rule was made to discharge him.

The

The King *versus* The officers of St. Mary's Parish in Marlborough.

MANDAMUS to the justices to make a rate for the support of the poor of the parish of *St. Mary, &c.* which was opposed, because the parish-officers ought to make the rate, and the justices are only to sign it; to which it was answered, that this motion was grounded on that clause in the statute *† 43 Eliz.* by which it is enacted, that where the inhabitants * of any parish are not able to relieve themselves, *two justices may tax other parishes, &c.* Thereupon a *mandamus* was granted, directed to the justices; and as this is a matter of right, they ought to make a return.

Mandamus to the justices to make a rate for the relief of the poor.
2 Sef. Caf.
65. pl 69.
† 43 Eliz.
cap. 2.
* P. 345.
Curia.

Phillips *versus* Doelittle.

A Lease was made reserving rent; and for non-payment thereof, that the lessor might re-enter; the rent was not paid, and thereupon the plaintiff brought an ejectment, and had judgment; and now a motion was made to stay the proceedings upon payment of what rent is due, and all the costs to this present time; and thereupon a rule was made, that the defendant should go before the master, &c. and he to take an account of what rent was due, &c. and that proceedings should stay in the mean time.

In ejectment for non-payment of rent; the plaintiff had judgment, but the proceedings were stayed upon bringing in the rent, and costs, &c.
10 Mod. 383.

Afterwards it was moved to discharge this rule, because it was made on an extraordinary motion, for the common motion is to stop proceedings on payment of what is due; now there can be no proceedings after judgment; to which it was answered, that though the plaintiff had judgment, yet this was a proper motion where such judgment was in ejectment; and this intirely depends on the rules of the court.

The court usually stays proceedings in ejectment on reasonable terms at any time before execution executed; but in this case it was ruled, that if the defendant did not bring in to the Master within three days, what rent was justly due, and the costs, that then the plaintiff might take out execution.

Curia.
2 Stra. 900.

Martin *versus* Pritchard.

IN an action of debt in *C. B.* on a bond conditioned to pay 100*l.* with interest, on the 5th day of December, &c. the defendant pleaded, that after making the bond, *et ante diem impetrationis brevis originalis, ff. 1 Dec.* he paid the money, &c. the plaintiff replied *non solvit modo & forma*, to which the defendant demurred special-

Where payment before the day is payment at the day.
Stra. 622.

ly, for that payment before the day was no good plea; and the plaintiff joined in demurrer. Judgment for the plaintiff in *C. B.* and error brought.

* P. 346. " *Strange* argued that the replication was ill, having put in issue " a day which is not material, as *Merril v. Joceline*, 10 *Mod.* 147. " Debt on bond; defendant pleaded payment before the day; plain- " tiff in his replication took issue thereon, and the issue was held " immaterial. *Cro. Jac.* 550, 586. The day in the plea, tho' " coming after the *ss.* cannot be rejected; for it is not inconsistent " with any matter precedent.

1 *Mod.* 147. " *Cur.* In the case of *Merril v. Joceline*, the defendant should " have pleaded *solvit ad diem*; but having pleaded a payment be- " fore the day, the point in issue only turned on that fact, which " made the issue material only if found one way; therefore in that " case the plaintiff should have demurred.

" In this case the day is intirely immaterial; this is a plea upon " the late act of 4 & 5 *Ann. c.* 16. so that the question is only, " whether the principal and interest was paid before the original sued. " If an original be produced subsequent to the first of *December*, " the plea will be good; for the day is only form.

" Judgment affirmed.

Parsons versus Peacock.

An executory devise to two upon a contingent of a third dying in the life time of those two.

IN *replevin*, the defendant avowed for a *rent-charge* devised by his grandfather to his uncle, and his heirs, which was now descended on him, this avowant; the plaintiff in his replication confessed the devise, but sets forth a clause in the same will by which the rent-charge was to cease.

* P. 347. * The case was thus: *ss. A.* being seised in fee, and having three sons, devised black-acre to *Giles* his eldest son, and to his heirs, and white-acre to *Edward* his second son, and his heirs, and a rent-charge of fifty pounds *per annum*, issuing out of *White-acre* to *Roger* his youngest son, and his heirs; proviso, that if either of his sons should die without issue, living the other two, so as his estate in lands should come to the other two sons, then the rent should cease.

Giles died, leaving issue *John Peacock* the defendant, and *Roger* died without issue; so that this contingency could never happen, because *Giles* had issue, and he being dead, and *Roger* likewise without issue, their estate in lands could never come to two, where *Edward* alone was surviving; therefore the rent-charge must descend to the defendant as heir at law, being the son of *Giles*, the eldest son of the testator; for this is an executory devise to two on the contingent of one dying in the life-time of the other two, which contingent must arise within the compass of one life, otherwise it is void;

Term. S. Hill. II Georgii, 1725.

void ; for it is plain, that the testator intended this benefit of survivorship during his sons lives only.

And the court being of that opinion, judgment was given for the defendant.

* D E

* P. 348.

Term. Paschæ,
Anno II Georgii, 1725.

Heavyfide *versus* Davis.

BY the statute 5 Geo. it is enacted, *That if the commissioners shall certify to the Lord Chancellor, that the bankrupt hath made a full discovery of his estate, and if four parts in five in number and value of the creditors shall sign such certificate, and testify their consent to the allowance thereof; and if it is allowed by the Lord Chancellor, then if the bankrupt be taken in execution, he upon producing such certificate allowed and confirmed, &c. shall be discharged by any judge of that court, wherein the judgment was obtained.* 5 Geo. c. 24.
6 Geo. c. 22. Bankruptcy in the principal shall not avoid a judgment regularly obtained against the bail.

In the principal case, there was judgment against the defendant, who became a bankrupt, and the plaintiff did not come before the commissioners to prove his debt, but took out a *scire facias* against the bail; and after two *nihils* returned, had judgment against them, and they were taken in execution.

And it was now moved, that they might be discharged, because a certificate of the commissioners allowed by the Lord Chancellor is a discharge of the principal, who if he had been taken in execution, would have been discharged upon producing it.

The judgment against the bail being regularly obtained, there *Curia.*

being fifteen days between the teste of the first writ of *scire facias* and the return of the second, and two *nihils* returned, *bankruptcy* * P. 349.
in the principal shall not be given in * evidence to avoid such a judgment regularly entered against the bail.

Griffith's

Term. Pasch. 11 Georgii, 1725.

Griffith's Case.

Where a condition is in the disjunctive, and one part of it falsified, the plaintiff must have judgment.

DEBT upon a bottomry bond conditioned, that such a ship should go from *London* to *Buenos Ayres*, and return thither within eighteen kalendar months without any *deviation* (the danger of the seas excepted,) and that then the obligor should pay so much money, &c. within twenty days after such return, or at the end of 18 months, &c.

The defendant in his plea did not answer the *deviation*, but pleaded that the ship did return within 18 months, and that he paid the money within 20 days.

The plaintiff did not demur to this plea (as he might for not answering the *deviation*) but replied and traversed the return of the ship within 18 kalendar months. To which replication the defendant demurred, and the plaintiff joined in demurrer.

And it was now insisted for the plaintiff, that the condition being in the disjunctive, (*viz.*) to pay so much money within 20 days after the return of the ship, or at the end of 18 months, the defendant might have pleaded performance of either part of the condition; and here he pleaded performance of one part, (*viz.*) That the ship did return within 18 kalendar months: which being traversed by the plaintiff was confessed by the demurrer; so that one part of the condition being falsified by this demurrer, the plaintiff must have judgment; and by the opinion of the court, judgment was given for him accordingly.

Anonymus.

Where a writ of inquiry was executed before the money became due.

THE plaintiff, who was tutor to two young scholars in *Cambridge*, brought an action on the case against their father; and declared upon an *indebitatus assumpsit* to pay so much for his salary for five years, and *nine months*, and upon a *quantum meruit*, &c. and had judgment by default, and a writ of inquiry for damages which was executed, and general damages given; and now it was moved in arrest of judgment, for that this writ of inquiry was executed the 4th day of *February*; whereas the *five years and nine months* did not incur till the 20 day of *March* following; so * that the jury having given damages generally, the plaintiff cannot have judgment for the damages, for the time not incurred, which he must have if he hath judgment upon this record; and the court inclined to that opinion.

* P. 350.

Wilson

Term. Pasch. 11 Georgii, 1725.

Wilson *versus* Machin.

BY the statute 8 & 9 Will. it is enacted, That every person obtaining judgment against the marshal or warden, &c. shall have their profits or some part thereof sequestered towards the satisfaction of the debt with costs and damages; but that act was not to lessen the security for money out of the marshalship of the King's Bench prison made by William Lentball, Esq; to Sir John Cutler, now vested in his executor Edmund Boulter.

8 & 9 Will.
cap. 17.
Where judgment is had against the marshal, the profits of the prison shall be sequestered.
See Stat. 27
Geo. 2. c. 17.

The marshal having suffered an escape, there was judgment against him for 18000*l.* and now a motion was made in behalf of the creditor to sequester the profits of the King's Bench prison, towards the payment of the said debt; which was opposed by the assignees of Boulter's mortgage; for that there was 14000*l.* still due to them for principal and interest; and that if the plaintiff would discharge that debt, he might take the profits of the prison to satisfy his debt.

Thereupon it was moved, that an account might be taken of what was due on that mortgage at the time that act was made, for it extends to no farther sum than *what was then due*, and what profits were received by the assignees, or might have been received without wilful default; which was granted accordingly.

The King *versus* Butler.

THE case, *ff.* One Hunt was bailiff of the corporation of White-church in Hampshire, in the year 1722. at which time Batchelor was chosen mayor by the jurors summoned by the said Hunt; and then the mayor continued Hunt bailiff for the next year, (*viz.*) for the year 1723. being the year of his mayoralty.

Thereupon an information in nature of a *quo warranto* was granted both against the mayor and Hunt, suggesting that no man could be mayor or bailiff there who was non-resident, * and chosen by non-residents, and that both the mayor and bailiff were non-residents, and therefore had usurped a franchise

P. 351.

And at the trial a verdict was found for the mayor, that he was an inhabitant resident, and against Hunt, that he was non-resident; thereupon the mayor named one Page to be bailiff.

And now the question was, whether the mayor could name a new bailiff, or whether one Neeve, who was bailiff before this mayor was elected, should continue bailiff, because by the constitution of this corporation, a bailiff duly elected is to continue in his office for a year, and until another is duly chosen, and Hunt was never duly chosen, because he was non-resident; and this being a controverted point, another information, &c. was granted to try it.

Term. Pasch. 11 Georgii, 1725.

Curia.
9 Ann. c. 20.

Informations in nature of a *quo warranto* may be brought (*with leave of the court*) at the relation of any person desiring to prosecute; and this is by virtue of the statute 9 *Annæ*, the end of which statute was to prevent frivolous and vexatious controversies, and therefore informations were not to be filed without leave of the court; but the question in this case seemed doubtful, and since it is controverted it ought to be tried.

Phillibrown *versus* Ryland.

Case against
the defendant
for shutting
the plaintiff
out of a room
where the
vestry was
held, not
good, because
he did not
shew that he
had a right to
enter into that
room.

2 Ld. Raym.
1388.
Stra. 624.
Ante 52.

THIS was a special action on the case brought by a parishioner against the defendant, for *shutting him out of the vestry*, he having offered to come in and vote amongst the parishioners, in which action the plaintiff declared, that public notice was given for an assembly to be held in the vestry room, adjoining to the church, being the usual place for meeting: and that every parishioner who paid scot and lot had a right to be present and vote at the vestry; that the plaintiff was a parishioner, &c. and paid *scot and lot*, and was coming to the said vestry, but was shut out by the defendant, so that he could not be present and give his vote at the meeting of the parishioners, and consulting for the good of the parish *per quod*, &c.

The defendant demurred specially to this declaration, for that the plaintiff did not shew any *special damage* by his being shut out; and the plaintiff joined in demurrer.

* P. 352.

And it was argued for the defendant, that an action on the case could not be maintained, without shewing some *special damage*; and that where several have a right in common with * others, the law will not allow that one of them shall have an action, because this would create multiplicity of suits; the offence in this case was shutting the door; which is an offence equally to every inhabitant, being equally a damage to each; and therefore ought not to be punished by action, which would be infinite; but as a nuisance, by indictment or information; as for instance, where a man stops up a way, the law will not allow an action to be brought against him by one, without shewing some special damage to himself; for the consequential damage which may happen by stopping the way, will not support an action.

† The chief
reason was,
because the
copyholder
before admit-
tance had nei-
ther jus in re
or ad rem.
Cro. Jac. 368.
pl. 1.

So where the custom of the manor was for the copyholders to name their successors; and a copyholder having named one to succeed him, the Lord refused to admit him, for which he brought an action; but adjudged it did † not lie; for if one might bring an action, every one might do the like; therefore to avoid multiplicity of actions, it was held that this action would not lie.

So where a Lord of a manor brought an action against the vicar, for not celebrating the sacraments in his parish-church; it was adjudged

judged that it would not lie, because the right to receive them was in common to all the parishioners, and he had laid the right in himself & *in omnibus tenementibus suis*, but it might have been otherwise if he had laid the right in himself and *family*. And the reason why the action would not lie is, because the not celebrating the sacraments was an equal damage to all the parishioners, and therefore one alone shall not bring an action; for if he might, it would multiply actions, which the law will not allow: besides, the plaintiff had a proper remedy in the spiritual court.

And all this was adjudged in * *Williams's case*, which was an * 5 Rep. 73. action for a *common nuisance* in the highway; and it was held that it would not lie, because it was unreasonable, that any particular person should have an action where the *damage was in common to many*; for if he should, then every man might have the like action against the defendant, and so he would be punished many times for the same cause; but if one hath a more particular damage done to him than another, in such case he may have an action for that particular injury, but not for a *nuisance*, because that is common to all people; and the common law hath appointed another method to punish offenders of that nature, (*viz.*) By presentment at the leet, or by indictment.

So where an action was brought by one of the inhabitants of *Littlebury* against the defendant, for not keeping up an antient ferry boat there, for them to pass over the river toll-free; it was held, that this action would not lie, because the not keeping up the ferry boat was a damage to all people who * had occasion to pass that * P. 353. way, but the not paying toll was an easement to the inhabitants of that vill only. But an action would lie by an inhabitant of *L.* for taking toll, for that is a private right.

So where the plaintiff brought an action for stopping an highway near his colliery; the court was divided whether the action would lie, for that it was the King's highway, and the plaintiff had only a convenience to pass, but no right to the way.

Salk. 15.
But this judgment was reversed in the Exchequer-chamber.

2^{dly}, But admitting this action would lie, yet this declaration is not good, because the plaintiff did not set forth any legal or prescriptive right in the parishioners to meet at a vestry; the plaintiff should have alledged a right in the inhabitants, time whereof, &c. to be present and vote; for otherwise there may be a select vestry, which was the case here; and the intent of this action was to try the validity of select vestries; it is true, he alledges that every parishioner who paid *scot and lot* had a right to be present and vote, &c. but that might be a voluntary right, for the parishioners are no *body politic* to take any legal or prescriptive right.

3^{dly}, Besides, the plaintiff did not set forth, that the parishioners had a right to meet in *this room*, and if they had no such right, then the action will not lie for shutting the plaintiff out of that room, for it may be in the defendant's own house, or in the house of some other person where the plaintiff had no right to enter.

Term. Pasch. 11 Georgii, 1725.

Yelv. 36.

As trespass will not lie for taking goods from the person of the plaintiff, unless he shews that they were his *own goods*, for they might be the defendant's goods for any thing that appears to the contrary.

Neither did the plaintiff shew, that the right was in all the parishioners, or that this was a *select vestry*.

Answer to 1st objection.

Those who argued for the plaintiff answered the objections made by the defendant's counsel, (*viz.*) that this was *damnum sine injuria*; and that the plaintiff should shew some special damage to himself, &c. it is true, an action will not lie for a damage without an injury; but it doth not follow from thence, that an action will not lie for an injury, without shewing some special damage; for every injury implies a damage, which is fully proved by the * cases in the margin.

* 11 H. 4. 47.
Salk. 19, 37.
Cro. Jac. 478.
6 Mod. 45.

Rol. Rep. 21.

Vent. 206.

2 Vent. 25.

2 Lev. 250.

† In the case

of Ashby and

White, all the

judges agreed

that the plain-

tiff had a

right, but that his remedy was elsewhere.

Caf. Temp. Holt 524.

As to that objection, that this action would not lie, for if it should, there would be multiplicity of actions against one person for the same offence; all the cases cited on the other side to that purpose

are, where there was † another remedy to punish the offender, either by *information*, *presentment*, or *indictment*; but in the principal case the plaintiff had no other remedy but by this action, for there was neither a breach of the peace, or any publick nuisance.

2 Ld. Raym. 949. Salk. 20. 6 Mod. 50. 8 St. Tr. 89.

3 Salk. 18.

As to the objection made to the form of this declaration, that the

plaintiff did not set forth, that he had a right to enter the room

where the vestry was kept, that is answered by shewing, that there

* P. 354. was a general summons for the parishioners * to meet on such a

day, and in such a room near the church; and admitting it to be

the defendant's room, yet if he let it for that day, it is then the

room of the parishioners for that day: and this the court will pre-

sume in this case.

But if the parishioners had any particular right to a *select vestry*,

that matter ought to be set forth by the defendant in pleading, which

he had not done, but † demurred; and the plaintiff had set forth

a sufficient right at common law to entitle him to this action; for

he declares, that every parishioner who paid *scot and lot* had a right

to be present and vote, &c. and that he was a parishioner, &c. and

paid *scot and lot*; and the parishioners are a body politick for that

purpose; and for many other purposes; parishioners may make

rates for repairing their church and may distrain for such rates.

44 E. 3. 19. Mod. Rep. 194.

Since by-laws bind the property of every inhabitant, it is rea-

sonable every inhabitant should have a right to dissent from or to

approve them. They have power of electing their own officers,

amenable only to themselves. 5 Mod. 325. Gibson's Cod. 241.

They

Term. Pasch. 11 Georgii, 1725.

They are a corporation to make *by-laws* for mending the highways, and for making banks to keep out the sea, and for repairing the church and making a bridge, &c. or any such thing which is for the publick good; all which was resolved in the * chamberlain of London's case; and by the statutes 3 & 4 Will. 3. c. 11. and 7 An. c. 17. §. 4. they are made a body politick to several other purposes, as to *tax* and levy the rate for maintaining the poor, and to tax the parish to make and maintain *engines* for extinguishing fires; and by the statute 9 Geo. c. 7. §. 4. they are made a body politick for purchasing *work-houses* to employ the poor, and consequently every parishioner hath a right to be present at their publick meetings in a vestry.

" *Raymond* Ch. Just. The plaintiff does not shew any right to the vestry to which he claims admittance; so that if he had no right to come in, the shutting the door against him could be no injury to him. But I am of opinion that this action had been maintainable if a right had been shewn; there is a difference between an act which is a common nuisance, and an act which disturbs the particular right of any persons; for the latter will intitle the persons injured to their several actions, though there may be 100 or more persons injured.

" *Fortescue* Just. *Rex v. Soley*; he was indicted for taking off the door of the guild-hall of a corporation, which indictment after a verdict was held ill; because no title being shewn to the guild-hall, it might be the freehold of the defendant.

" *Reynolds* Justice, The declaration is ill for the objection that was taken; but without difficulty I should hold the action maintainable, if the declaration had been good; every parishioner has a right to assemble, and if illegally obstructed, he has no remedy but by an action on the case: no information can lie unless there be a riot or breach of the peace. *Salk. 12. pl. 1.* is a case in point.

" *Judic' pro Def.*

* *Kent versus Kerry.*

* P. 355.

IN *dower* in the Common Pleas, wherein the plaintiff declared for her *dower* in three messuages, and *three tenements*, &c. the tenant confessed the action, upon which judgment was given to recover her dower and damages: a writ of error was brought in this court, and the errors assigned were,

1st *Exception.* That the word *tenement* was of such an uncertain signification in the law, that the sheriff could not deliver possession of it; that by the concurrent authorities in the books, *an + eject-*

Sid. 295. March 96. Noy 86. 3 Leon. 28. Cro. Jac. 125, 621. Cro. Car. 188. 3 Mod. 238.

Term. Pasch. 11 Georgii, 1725.

ment will not lie of a tenement for the reason before-mentioned, neither can a *fine* be levied of it.

2d Exception. Besides, the plaintiff did not set forth, that her husband died seised, for which reason no damages can be recovered by the statute; and yet the sheriff hath executed a writ of inquiry of damages, and by virtue of the writ *habere facias seisinam* hath delivered to the plaintiff seisin of such an house, &c. or so much thereof as is worth 10*l.* *per ann* which is void for the incertainty.

Econtra. The counsel for the plaintiff argued, that in dower there was not so much certainty required as in a *præcipe quod reddat*, or other real action, for a writ of dower lies of a *† garden, croft, or cottage*; but if it did not lie of a *tenement*, yet the tenant coming in, and confessing the action hath made it good; for a plea often aids defects and uncertainty in a declaration.

* P. 356. * It is certainly so, where the defendant hath pleaded collateral pleas to a declaration where the demand was not sufficiently set out; this is proved by the cases in the *† margin*, and by a late case between *Gibley v. Williams. Hil. 12 W. 3.* Debt by an administratrix upon a bond; *non est factum* pleaded; and found for the plaintiff. An objection was taken to the declaration for not shewing the letters of administration, nor by whom granted, nor so much as styling herself administratrix of the debts, goods and chattels of the deceased. But it was over-ruled, the plaintiff's title being admitted by the plea.

As to the objection concerning damages, it is very true, that the plaintiff ought to have set forth, that her husband *died seised, &c.* and that it is a fatal error to omit it; but it is an error for which the judgment for damages shall only be reversed; for in dower the judgment is compleat before the damages are recovered; it is like a *† quare impedit*, where the first judgment is good by the common law without damages.

Curia. " Here is a demand made of a specific thing which is to be recovered and assigned by the sheriff. The confession cannot aid the incertainty. The cases quoted are different; for there money only is to be recovered. Tenement is uncertain: The declaration cannot be maintained. Judgment reversed.

Burland versus Tyler.

Plaintiff as administrator brought an action in the *debet & detinet* against the heir; this being a fault in form, no advantage shall be taken of it, but upon a special demurrer. 2 Ld. Raym. 1391. S. C. S. P.

" AN administrator brought an action of debt in the *debet* and *detinet* against the heir of the obligor, and concluded his declaration, *ad damnum ipsius* the plaintiff, &c.

" On

Term. Pasch. 11 Georgii, 1725.

" On demurrer to the plea, which was admitted to be ill, *Top*, Mo. 566.
" for the defendant, insisted that the declaration was naught, to Cro. El. 711.
" which he took two exceptions : Cro. Jac. 546.
Lane 79.
Stile 232. 5 Rep. 31. a. b.

" For that the action brought against the heir in the *debet* and 1st Exception.
" *detinet*, when it should be in the *detinet* only.

" For that the declaration concluded, *ad damnum ipsius* the plain- 2d Exception.
" tiff, when it should be in *retardationem administrationis*.

" *Chapple* Serj. The first exception would have been cured, if Contra.
" after a verdict, by stat. (a) 16 & 17 Car. 2. c. 8. and if so, it Lev. 124.
" will be cured by St. 4 An. c. 16. f. being after a general de- Sid. 342.
" murrer. (a) Perpetu-
ated by stat.
22 & 23 Car. 2. c. 4.

" The *Oxford* (b) act cured the defect, if a verdict had passed : Curia.
" and by Stat. 4 An. c. 16. judgment is to be given without re- (b) Stat. 16 &
" spect to any defect in the declaration (unless shewn for cause of 17 Car. 2.
" demurrer) so as the right of the cause appears. c. 8.

" 2d. This is only matter of form ; besides, the modern prece-
" dents are according to this declaration.

Judicium pro querente.

* The King *versus* Westbury.

* P. 357.

THIS was an indictment against the defendant, for that T. S. Indictment
and other bailiffs, &c. did, *virtute brevis domini regis de* for a rescous
fieri facias, and a warrant thereon, levy the goods of M. G. and setting forth
that the said defendant *Westbury* with others did assemble, and *quo cum vir-*
tute brevis,
tofe & routose did rescue the said goods, and assault and beat the bai- &c. de fieri
liffs, and so disturbed them *in executione brevis & warranti prædicti*. *facias*, and
a warrant
Upon Not guilty pleaded, it was found against the defendant, and thereon, he
now moved in arrest of judgment, for that the *fieri facias* was not levied the
well set forth ; for it was *virtute brevis domini regis de fieri facias*, goods, &c.
and the defen-
without setting forth the writ itself, and without mentioning the dant rescued
party's name ; then it sets forth, that there was a warrant *secundum* them ; this is
ill, for the
exigentiam brevis prædicti, and that the defendant disturbed the *fieri facias*
bailiffs *in executione brevis & warranti prædicti*, which is ill ; for should be set
forth at large.
if there was no writ, there could be no warrant ; it is true this in-
dictment mentions a writ, but it is not well set forth, and if so, the
warrant must fail ; for the court can never judge whether it is *se-*
cundum exigentiam brevis, when no good writ appears to be made.

This writ is set out by way of circumstance only, *quod cum virtute* Econtra,
brevis, &c. but if there was none ; yet the warrant would justify the
bailiffs, or maintain this indictment for the wrong done.

It

Term. Pasch. 11 Georgii, 1725.

Curia. It is very true, the bailiff may defend himself by the warrant, but a writ must be shewn to charge a stranger; and this is the constant difference in such cases; and as this case is, an indictment would have laid for a single battery, but the warrant itself, and the disturbing another in the execution of that warrant both refer to the writ, and that being not well set forth, those things which refer to it must necessarily fail, for which reason the judgment was set aside.

* P. 358.

* The King *versus* Grey.

Where by a surrender of a charter the corporation is not dissolved. **A**N indictment was found at a quarter-sessions held in Colchester before the *justices of peace for the county of Essex*; and this was for a *nusance* done there by the defendant, by laying *pigs of lead in the high-road*: which indictment being removed by the defendant into *B. R.* by *certiorari*, the defendant pleaded, and set forth the charter of King Charles II. by which this borough was incorporated, and cognizance granted to them to determine all pleas and affairs arising within that town; with a clause that no justices of peace for the county at large shall enter into the said borough, *nec deinde in aliquo se intromittant, nec eorum aliquis se intromittat quovis modo, &c.* and that this indictment was void, being found there before the justices of the county, who had no jurisdiction in the said borough.

† But quære who replies in these cases? whether the Attorney General, or the Master of the Crown-office, whose title is "Coroner and Attorney of the Lord the King."

The King's † coroner replied, and set forth a surrender of the said charter granted by *Car. 2.* to this corporation, &c. and of all and every the liberties and franchises therein contained.

The defendant rejoined, and set forth the letters patent of King William and Queen Mary, by which all the lands, privileges and franchises of this corporation were granted, restored, and confirmed to them in as large a manner as at any time they enjoyed before the surrender.

And upon a demurrer to this rejoinder, these points were made.

See. 2 Stra.
1154.

(1.) Whether the King can by his charter grant to certain persons, in a certain place, a power exclusive of himself, so that at no time afterwards he can administer justice in the same place: and if it should be admitted, that the King might grant such an exclusive power or jurisdiction, then whether he hath granted it by these words in the charter, (*viz.*) That the justices of the county shall not enter the borough, *nec se inde in aliquo intromittant, &c.*

(2.) Admitting that such an exclusive jurisdiction is granted by this charter, yet Mr. Reeve *pro rege* argued, that the manner of demanding cognizance is not legal. It was adjudged in *Manners and*

Fern,

Term. Pasch. 11 Georgii, 1725.

Fern, Ann. B. R. that the defendant may plead cognizance as well as the Lord may demand it: but it was then held that he must come the very first instance and make the claim. In this case the defendant ought to have pleaded the cognizance at the quarter-sessions, and not to remove the indictment and then plead it above; he has by so doing elapsed the time allowed by law.

Fortesc. Rep.
158.
10 Mod. 125,
156.
5 Vin. Abr.
589. pl. 22,

(3.) The chief question was, whether by the surrender of the charter made *anno* 36 Car. 2. the corporation was wholly dissolved; for if it was, then the charter of *King William*, by which the lands and privileges were regranted, is void, because it was to a corporation not in being.

* As to the first point it was argued, that this charter granted *anno* 15 Car. 2. did not give exclusive cognisance to this corporation, but that there remained a concurrent jurisdiction in the justices of the county, for the words are, that the justices of the county shall not enter the borough, *nec se inde in aliquo intromittant*, that is, they shall not enter to exercise any jurisdiction: but this doth not exclude them from entering to take *presentments* and *indictments* for any misdemeanors committed there. It is like the grant of a franchise to return writs, but notwithstanding such grant the sheriff is not excluded.

* P. 359.

So at the best these are doubtful words, and therefore shall never be intended to enlarge the jurisdiction of this corporation, so as to exclude the justices of the county.

† The second point was not much insisted on, because if the indictment was void, as taken *coram non judice*, then there could be no occasion of pleading this exclusive cognisance below and immediately: but supposing there should, a *certiorari* doth not make the merits of the plea worse, for the defendant hath done no act to admit the jurisdiction of the justices.

† This mark'd with Italics is wrong placed, it should have come in fol. 360. as said in behalf of the defendant, for so it was in fact, being part of serjeant Co-myns's argument, who argued for the defendant.

Therefore this is not like a claim of cognisance, &c. because in such case, the act done is only to be avoided by pleading such claim, and that in due time, for otherwise justice might be delayed by an untimely claim.

As to the third and chief point, it is admitted by the pleadings, that the charter granted by King Car. 2. in the 15th year of his reign, was surrendered; and it was insisted, that by such surrender the corporation was absolutely dissolved, and if so, then the charter of *King William and Queen Mary* is wholly void, because it is not a grant of creation, but of confirmation and restoring the liberties of a corporation which was not then in being, and so could not take by such grant; and it shall never be taken for a charter of creation and confirmation too, for that would be to a double intent, which the law doth not allow in such cases.

Rol. Abr. 513.
(F) pl. 1.
Co. Rep.
52. a.
Co. Lit. 264. a.
29 E. 4. 6. 11.
2 Co. Rep. 56.

Besides, here are no words of creation, and therefore it is like that case in the year-book 9 Ed. 4. 11. where the King granted an office to T. S. but it was held, if this was not an office before the

Term. Pasch. 11 Georgii, 1725.

grant, it was not good, because there were no words of *creating* this office.

So if the King grants such a thing *inhabitantibus de Dale*, this is void, unless they were a corporation before the grant, for the reason before-mentioned.

! Econtra:

* P. 360. It was argued to quash this indictment as taken *coram non judice*, that by the charter *anno 15 Car. 2.* an exclusive jurisdiction * was granted to this corporation, and that the justices of peace of the county had none there, for the corporation-men have the authority of justices within their corporation; and the justices of the county are not to enter, or *in aliquo se inde intromittere*.

20 H. 7. 6. 7. And so is the *Abbot of St. Alban's* case, where the King granted
18. a power to him to make justices of peace within the borough of *St. Albans*, *ita quod* the justices of the county of *Hertford* should not
Brooke Abr. intermeddle, in the same words as in the present grant; it was ad-
tit. Patent 111. judged in that case, that the justices of the county were excluded;
Crompt. Jur. 18. and that if they acted in the said borough, it was *coram non judice*,
and by consequence void; and all exclusive jurisdictions in letters patents are always in this form of words, and no instance can be given to the contrary.

The grant of the return of writs was a particular franchise, and not parallel to this case, because it did not appear upon the record, that the sheriff was excluded, or that he had no jurisdiction within that liberty, and it could amount to no more than to exclude the sheriff in person.

It is true, the sheriff, notwithstanding such grant, may make a return; but if he doth, it is an injury done to him who had a grant of that franchise, for which he may maintain an action against him.

As to the chief point, that by the surrender of this charter, the corporate body was wholly dissolved, and therefore their liberties could not be restored by the charter of *King William*, because there was no corporate body in being to take; it was argued, that the corporation was not entirely dissolved; it is true, by this surrender all their lands and liberties were given up, but still they had a corporate capacity to take, &c.

But admitting that their corporate body was entirely dissolved, yet by the grant of *King William* it appears, that he intended to re-instate them in the same privileges which they had lost, *for he gave them the same liberties by way of grant and restitution*; the charter of revivor has used the same words as are used in the charter of surrender; and certainly they will have the same effect to re-vest as they had to de-vest; therefore this is not like that case where the King made a grant *inhabitantibus de Dale*, for there he was deceived in his grant, there being no corporation before; and certainly where a corporation is re-instated by a charter, the King intended to give them a capacity to take; and where his intent appears, and no set form of words are requisite for that purpose in the grant, there his intention shall prevail.

Term. Pasch. 11 Georgii, 1725.

* The court seemed of different opinions in this case, the Chief Justice being of opinion upon the first point, that the King might grant to others so as to exclude himself from administering justice in the same place afterwards; for he is the fountain of *jurisdiction* as well as of *justice*, and may distribute it as he thinks convenient; and for this there is an authority in the year-book 20 H. 7. 6. *Curia. P. 361.*
See Hardres 505.
Quære this.

Two other judges laid no great stress on that case, for it appears by *Dugdale's Origines Juridicales*, that there were but two judges then in court, who held that the King might grant by a charter exclusive to himself; it is true, there can be no inconvenience of failure of justice, if the King had such a power; because, if it is misused or abused, it is forfeited. *Dalton 23. Lamb. 47.*

And therefore three of them held, that the King might exclude himself by his charter, which *Fortescue* denied, for that he had still a concurrent jurisdiction which he had granted by commission to the justices of the county; therefore it is not void as to *Colchester*, and good for the rest of the county, but voidable only as to *Colchester*, and if so, there can be no inconvenience in it, because then the corporation may claim their right, and so may the party grieved. *Quære this. Dalton 10.*

As to the chief point, whether the very being of the corporation was destroyed by this surrender? three of the judges held that it was not, and compared it to the surrender of a deed, that the estate was not thereby surrendered, therefore the corporation was still subsisting, and had a capacity to take, and by the charter of *King William did retake*; and it would be very inconvenient if it should be otherwise (that is) if they could give up more by a surrender than they can take by a regrant.

In the great case of the *city of London* several learned men were of opinion, that a surrender did not destroy the being of a corporation; this appears by the surrender of abbies in the reign of H. 8. for it was not thought proper at that time to rest purely on those surrenders, but to have them confirmed by act of parliament.

There is a particular proviso in the statute * 27 H. 8. that corporations shall have the power of making justices of peace as they had before, which power is mentioned in the statute † 22 H. 8. which act is confirmed by the statute 3 & 4 Ph. & Mar. and though the King is impowered by act of parliament to make justices of peace in the counties; it cannot be inferred from thence, but that he may limit and abridge this power to certain precincts in the counties. *Quære this. Cap. 24. §. 6. † Cap. 5.*

* *Fortescue* held, that though barely by the surrender of this charter, the corporation was not dissolved, yet there were other words in it, by which they gave up all the liberties and privileges which they then enjoyed, by which words the very being of this corporation was dissolved; and if so, then the next question will be, whether it was restored by the re-grant of *King William*. ** P. 362.*

For

Term. Pasch. 11 Georgii, 1725.

For there is no occasion of any set form of words in letters patent of incorporation, for the first and original grants of them was to have *gildam mercatoriam*, therefore by the charter of *King William*, by which all the lands and liberties were granted, restored and confirmed to this corporation, they were actually restored, and intended by the King so to be.

But this being a case of great weight, it was adjourned farther to be argued.

Morice *versus* Lee.

The indorsee brought an action against the drawer, upon a note by which he promised to account with T. S. or his order, for 50*l.* value received, and good.

* 3 & 4 Ann. cap. 9.

2 Ld. Raym. 1396.
Stra. 629.

AN action was brought against the drawer by the second indorsee, upon a note given in these words, (*viz.*) I promise to account with T. S. or his order, for 50*l.* value received by me, &c.

After a verdict for the plaintiff, it was moved in arrest of judgment, that this was not a good note within the statute of *Queen Anne*; it is plain it is not within the words of the statute, for those are, *all notes signed after the first of August 1705, by any person promising thereby to pay to another, &c. or order, or bearer, &c. shall be assignable, and the drawee or indorsee to whom the money is payable, may maintain his action for the same against the drawer or indorser.*

Now this note is not negotiable, because the promise is not to pay money, but to account, and in all promissory notes the drawer must be an absolute debtor, otherwise they cannot be negotiated; but in this note he is not a debtor originally, though he may be so when the account is stated; so this may be between merchant and factor; and therefore if the drawer had applied this money as factor to T. S. he might have avoided the payment of the money by that means.

In the case of *Smith versus Boheme*, anno 1 *Georgii*, it was resolved, that where one promised to T. S. to pay 70*l.* or to surrender the principal; this was not a note assignable within the statute, for it was not negotiable *ab origine*, and shall never be made good by consequence.

Eccontra.

* P. 363.

* It was said on the other side, that this was a good note within the statute; and if so, the action is well brought by the *endorsee*. It is true, it is not within the very words of the act of parliament; but the statute ought to be favourably construed, because it was made for the advancement of justice, and for the ease and benefit of traders.

It is like the construction which hath been made on the statute of waste, where the words are *ex dimissione*; but it hath been resolved, that estates *ex provisione legis*, (*viz.*) Estates by the *curtesy*, or *in dower*, are within the equity thereof.

+ Salk. 9.
139.

Besides, the note itself hath the badge of a *promissory note*, for it is to be accountable to T. S. or his order, which word + *accountable* is not so very uncertain, for it is laid in the declaration upon an express

Term. Pasch. 11 Georgii, 1725.

express promise; and therefore good after verdict, especially since the statute doth not prescribe any set form of words in which these promissory notes are to be drawn.

The case of *Smith* and *Bobeme*, and so likewise the case of *Appleby* and *Biddolph*, (where the note was in these words, *I promise to pay to T. M. so much money, if my brother doth not pay it within such a time*, in both which cases judgment was arrested after a verdict), are authorities not applicable to the principal case; because the *drawer* was not the original debtor, but might be a debtor upon a contingency.

“ * *Raymond* Ch. Just. The act of 3 & 4 *Ann.* is a remedial law, *Curia*.
“ and to be extended in construction as far as in reason we can; * P. 364.
“ the expressions used for these notes always vary; it is sufficient
“ if the substance of the note is a promise to pay money; an em-
“ ployment of this money in factory might have been given in evi-
“ dence as an excuse for the non-payment; the contrary of which
“ is now to be supposed since a verdict is found for the plaintiff.

“ *Fortescue* Just. The court will construe this note as a note for
“ payment of money; for a note to account to me or order is ab-
“ surd; I have seen several promissory notes drawn in this form;
“ a man that receives money to account for, does not receive the
“ money as a duty, but as a trust; therefore no *indebitatus assump-*
“ *sit* lies, without shewing some misapplication, or breach of trust:
“ besides, this note is for value received; if there had been no ver-
“ dict, I should have thought this a good promissory note: but the
“ verdict has put it beyond all dispute, because now a promise to
“ pay is found. A promissory note in this form had been good,
“ *I promise that J. S. or order shall receive 100l.* The case of *Smith*
“ *v. Bobeme* was no promise to pay at all, but to pay or surrender;
“ no precise form is required, for these notes, or for bills of ex-
“ change; a bill of exchange may be between two persons, *I pro-*
“ *mise to pay to myself or to my order.* This is a debt, being for
“ value received, and not said on account; whereas a receipt of
“ money to account creates a trust. How can a 4th or 5th indor-
“ see account with the defendant?

“ *Reynolds* Just. This had been a good promissory note within
“ the statute, had there been no verdict; no form is prescribed by
“ the statute. The objection that has been generally taken to pro-
“ missory notes has been, that the money has been payable only
“ out of or upon the credit of such a particular fund, and not de-
“ pendant on the credit of the drawee, as *Jocelin v. La Serre* G. 1. *Fortescue* Rep.
“ in *B. R.* a promissory note to be responsible for 100l. would be ^{281.}
“ a good promissory note within 3 & 4 *Ann. c. 9.* ^{10 Mod. 294.}

Cur. Judgment for the plaintiff.

The King *versus* Bishop of Chester.

Faculty granted by the archbishop need not be subscribed, registered or enrolled by the chief clerk of the faculty, but by his deputy.

ERROR of a judgment in a *quare impedit* brought in the County Palatine of Lancaster, against the Bishop of Chester, for refusing to admit one Peploe to the wardenship of Manchester-college, upon the presentation of the King.

The Bishop pleaded, that he claimed nothing but as ordinary, and set forth that this college was founded by Car. 2. who appointed a warden thereof, and that all successive wardens should be bachelors of divinity; and that the said Peploe was not a bachelor of divinity: therefore he (the Bishop) could not admit him to be warden. And upon issue joined, whether he was a bachelor of divinity or not, the cause was tried, and evidence was given, that the Archbishop of Canterbury had granted a faculty or degree of bachelor of divinity to the said Peploe *instanter*, which faculties were grantable by the Archbishops of Canterbury for the time being, by custom and usage immemorial, and this was confirmed to them by the statute 25 H. 8. c. 21.

The counsel for the defendant tendered a *bill of exceptions* to this evidence, which was over-ruled below: and thereupon a verdict was found for the King. And now the defendant brought a writ of error, and assigned these errors following:

Stra. 624.

* 9 & 10 W. 3. c. 25.

2 Stra. 797.

(1.) It did not appear that this *faculty* was stamped, or that the duty was paid at the time it was enrolled in Chancery, as it ought to be by virtue of the * Statute 9 W. 3. therefore it not being stamped when enrolled, it is void.

(2.) This *faculty* was not subscribed and registred by the Archbishop's clerk of the *faculties*, as required by the said statute 25 H. 8.

* P. 365.

(3.) That it was not subscribed and enrolled by the King's clerk of the *faculties* in Chancery, as it ought, because he is empowered by the statute to tender an oath to the person who hath obtained it: which statute was made to restrain the extravagant grants of the Pope in those days, and therefore should be fully and strictly performed by the *clerks themselves*, and not by their *deputy-clerks*. And this must be intended by the legislators, for otherwise this act would have been penned as the statute of wills, or as the statute of promissory notes, by which it is enacted, that the signing shall be by the parties themselves, or by any other person authorized by them. Therefore this must be done by the *principal clerks themselves*, and not by their under-clerks, for it is not assignable to them: and therefore this faculty is void, especially since there is a proviso therein, that it shall not be good till subscribed and registered by the clerk of the *faculties* in Chancery, which is in the nature of a condition precedent, and not to be signed or subscribed by his order.

Term. Pasch. 11 Georgii, 1725.

(1.) To which it was answered by the counsel on the other side, *Econtra.* and so resolved by the court, first, that the *stamp-act* was only to secure the duty to the crown; and not to take away any evidence from the parties; the clause therein is, *That if any person shall write on parchment or paper charged with the duties payable by that + and former acts, he shall forfeit ten pounds, and that it shall not be given in evidence till the duty and penalty is paid;* and it is every day's practice, that upon payment of the duty and penalty, the writing is made good. + 5 & 6 W. 3. c. 21.

(2.) As to the second exception, that this faculty was not subscribed by the Archbishop's clerk of the faculties, but by his under-clerk, when it is expressly required by the statute 21 H. 8. that it should be signed by the clerk himself, which is very true: but the act is but directory, and it is not said, that it shall be signed by the chief clerk himself: so that this being signed by his under-clerk, and it being customary in this office for the under-clerks to sign faculties, this exception is of no weight.

(3.) As to the third and chiefest exception, that there is a proviso in the *faculty* itself, that it shall not be good, unless subscribed and registered by the clerk of the faculties in Chancery, it was held, that where a man doth any thing by the express order of another, as it was done in this case, it is as good as if done by himself; as where one expressly orders another to sign a deed which the person thus ordered, did afterwards sign, this is good as one determinate act: but where a deputy doth any thing by virtue of general deputation, it must be where a deputy may be made by law.

The judgment was affirmed.

* *Steed versus Lateward.*

* P. 366.

THERE was a judgment by *default* against the testator, who died; and the plaintiff brought a *scire facias* against the executor to shew cause *quare inquisitionem non habet, &c.* and afterwards the writ of inquiry was executed. And now it was moved to set aside the execution thereof; for that the defendant had no notice given of executing this writ of inquiry till his goods were taken in execution; and to have restitution. By a rule of court, to give notice on executing every writ of inquiry; and this is certainly a writ of inquiry. This point was adjudged *Mich. 12 Ann. Cockley v. Delauney.* Notice must be given upon a scire fieri inquiry. Stra. 623, 635. 2 Ld. Raym. 1382. Stra. 235. S.P. determined in the Common Pleas. 2 Barnes 237. Pract. Reg. C. P. 379. Rep. and Caf. of Pract. C. P. 1.

“Fazakerly contra. The practice of the court hath been contrary since that resolution; no notice is ever given on executing an *elegit*, where an inquisition is likewise taken; because it is only for the sheriff's information.

Cur.

Term Pasch. 11 Georgii, 1725.

“ *Cur.* We cannot vary from that resolution. In ejectment the
“ constant course was to take out execution after the year without
“ any *scire facias*: but the court thought proper to alter that
“ course, by resolving that a *scire facias* was necessary. Upon the
“ *fi. fa.* the sheriff may return a *devastavit*: but by that return (if
“ false) he subjected himself to an action, which by this method
“ is prevented.

“ And afterwards on the Master’s report it was set aside, there
“ being no difference between this and other writs of inquiry. *Phi-*
“ *lips v. Biron*, Mich. 6 G. B. R.

Stra. 509.

The King *versus* Tuck.

† 6 & 7 W. 3.

cap. 11. re-
pealed by

19 Geo. 2.

c. 21. s. 15.

2 Ld. Raym.

1386.

Objections to
a conviction
for profane
cursing and
swearing not
allowed.

THE defendant was convicted before a justice of peace upon
the † statute made against *profane cursing and swearing*; and
upon a motion to quash this conviction, the objections were as
follow:

§. By the statute, the person convicted is to forfeit 2s. for every
oath, if he is not a *common labourer, soldier, or sailor*; now it did
not appear upon the oath of the informer, that the defendant was
a *gentleman*, and neither a *common labourer, soldier, or sailor*.

(2.) It doth not appear by this conviction of what age the de-
fendant was, when he did profanely swear; for by the statute
he must be above 16 years old.

* P. 367.

* (3.) This conviction is incertain, for after the nature of the
oath is set out, the witness swears, that the defendant repeated it
sixteen times, for which he is convicted to forfeit 32s. whereas a
repetition presupposes a former act done; so he swore seventeen times;
therefore the conviction doth not agree with the evidence.

Curia.

The court held, that it shall be intended the defendant was of age,
and a *gentleman*, if so charged by the informer; and it is not ne-
cessary to aver, that he is not a *soldier, sailor, or common labourer*,
since he is charged with 2s. for every offence; and as to the not
charging him with more than sixteen times, when it should be se-
venteen times swearing, it is but giving one oath free, and there
must not be too much nicety in these convictions: in the case be-
tween *The King* and *Sparrow*, the conviction was quashed for not
setting out the oath. Ante 58.

The King *versus* Dr. Shippen and others.

In a prohibi-
tion the que-
stion was, who
is visitor of
University
college in
Oxford.

IN a prohibition, the case was, Dr. Cockman and Dr. Dennison
were candidates for the mastership of University College in Oxford,
and the first was declared master, but Dr. Dennison, and the dis-
senting fellows of the college appealed to Dr. Shippen, the vice-
chancellor

Term. Pasch. 11 Georgii, 1725.

chancellor, and others, as *visitors*; and thereupon it was suggested by *Dr. Cockman* in a prohibition, that this college was founded by *King Alfred*, anno 872. as by several inscriptions in the college it doth appear, and that the members thereof always commemorate that *King* in preaching, and all other publick acts, and that the *Kings of England* were always visitors of that college, and no other person had any visitatorial power there.

This cause was referred to the *attorney and solicitor general*, and they were to report who was the founder of this college; and they reported, that it was too difficult for them to determine after so long a time, who was the founder, and of greater difficulty to determine, whether the *vice-chancellor* was *visitor*; thereupon a rule was made, that the defendant should shew cause why a prohibition should not go.

* *Martin versus Budgell.*

* P. 368.

UPON a judgment by default, and a writ of error brought in parliament, the error assigned was thus:
H. *Memorandum quod alias scilicet termino Sancti Michaelis ultimo præterito coram Domino Rege apud Westm. venit T. S. &c. per Johannem Stone attorn. suum & protulit hic in curia dicti Domini Regis tunc ibidem quandam billam suam, &c.* when there was no such bill of that term; and upon a *certiorari* from the house of Peers to the chief justice of the King's Bench, he certified that there was no such bill.

After the want of a bill filed in such a term, and certified by the Chief Justice, a bill shall not be filed of any other term. See before 283, 284, 285.

Whereupon the plaintiff suggested a bill of another term, and moved the court that it might be filed; and had leave to move the house of Lords for another *certiorari* directed to the chief justice, that he might certify the bill of that term suggested; and that house ordered, that the plaintiff should have leave to sue out another *certiorari*, and allowed his suggesting a bill of another term; and now he moved the court for leave to file a bill of the term as suggested, as originals of another term are allowed to be filed in the court of Common Pleas.

In the case of *Walmsley versus Corey*, the *memorandum* was allowed to be amended by the bill. And this motion being made to support a judgment given in *B. R.* which was affirmed upon a writ of error in the Exchequer-chamber; and a writ of error now brought in parliament, after a bill in Chancery brought for relief, and that bill dismissed, the court ought to do any thing in their power, after all these proceedings, to support this judgment, especially since the merits of the cause are entirely against the defendant; for otherwise he would have been relieved in some of those courts; and as the declaration is but the copy of the bill, so the bill may be taken from the declaration.

Term. Pasch. 11 Georgii, 1725.

In the case of *Calvert* versus *Castilian*, it was held and so allowed, that a bill might be filed after the want of it was assigned for error, which shews, that a bill may be filed at any time.

Econtra.

The counsel on the other side said, that the motion was improper after it was certified, that there was no such bill of that term; and that the want of the bill is a good cause to be assigned for error, appears by the statute made for the amendment of the law, by which it is enacted, *That judgments by default, nil dicit, or upon demurrer, shall not be reversed, if a bill is duly filed*, which shews, that if it is not duly filed (as it was not in this case) such judgments shall be reversed.

The court of Common Pleas will not admit the filing an original after the want of it is assigned for error; neither will this court admit the filing a bill after the want of it is certified by the Chief Justice: if they should, they ought to do it in all cases, and consequently the omission of filing bills will be cured; and then it will be ludicrous to assign the want of them for error.

2 Stra. 735.
10 Vin. Abr.
39. pl. 47.

It is true, this motion might have been proper before the Chief Justice had certified that there was no bill of that term; for then the court might indulge the plaintiff to file another bill; and that was the case of *Calvert* versus *Castilian*: but never after the court hath certified (as in this case) that there was no bill of that term, because a bill of any other term will not warrant this *memorandum*, which recites, that the bill was of such a term; therefore there being no bill of that term, the judgment ought to be reversed.

It is admitted, that the judgments in the Common Pleas are supported by originals of former terms, which is done and allowed by entering *continuances*: but it doth not follow from thence, that the judgments in this court may be supported by filing bills of any other term than what is set forth in the *memorandum*; for in the Common Pleas the *memorandum* is general, without alledging it to be of any certain term; but the *memorandum* in *B. R.* is, that the bill was of a term certain, and by consequence cannot be warranted by a bill of any other term.

* P. 370.

" * *Raymond* Ch. Just. I see no difference between giving leave to file this bill, and granting an amendment after a writ of error brought.

" *Fortescue* Just. It is expressly resolved 8 Co. That what is amendable at common law is amendable at any time. This is the same as the case of * *Winckworth* v. *Clarke* Tr. 4 Geo. B. R. where continuances were permitted to be entered to the bill of *Middlesex* after a writ of error brought. I have often heard it said that a bill of *Middlesex* may be filed at any time. *Calvert* v. *Castillo*.

* 2 Stra. 735.
10 Vin. Abr.
39. pl. 47.

" *Reynolds* Just. No writ of error will be ever brought, if after an assignment of it for error, it may be aided by filing a bill.

Term Pasch. 11 Georgii, 1725.

“Cur. It cannot be filed but by motion in court. And upon
“considering the circumstances of the case, as here appears to
“have been the most affected delay, the bill may be filed of a
“term precedent with continuances, so as to agree with the me-
“morandum. Cur. *advizare vult.*

Rex *versus* Inhabitant’ Sanctæ Mariæ Matfellow alias
White Chapple.

A Poor man was hired for five years to work at a glass-house in the parish of *White Chapple*, from six in the morning till eight at night, and lodged every night in the parish of *White Chapple*, only not in his master’s house; this man was removed by an order of two justices from *White Chapple* to *Ratcliffe*; and upon appeal to the sessions the order was quashed, the court being of opinion that he was settled at *White Chapple*.

Settlement of a poor man shall be in the parish where he serves and hath wages, and not in the parish where he lives.
2 Sess. Cas.
120. pl. 114.
Fol. 101.

William Maddox and Robert Godfrey *versus* Taylor and others.

IN trespass for breaking and entring the house of *William Maddox*, and taking the goods of *William Maddox*, and *Robert Godfrey*, *ad damnum ipsorum*; after a verdict for the plaintiffs, and entire damages, it was moved in arrest of judgment, that this action could not be maintained, since the jury had given entire damages; for how can the plaintiff *William Maddox* (who had no right in the house, for that was in *Robert Godfrey*) recover damages for the unlawful entry? So judgment was arrested.

Trespass by A. and B. for breaking and entering the house of A. and taking away the goods of A. and B. on verdict for the plaintiffs, and entire damages, judgment arrested.
2 Ld. Raym.
1381.

*D E

* P. 371.

* D E

Term. Sanct. Trin.

Anno II Georgii, 1725.

Philips *versus* Fish.

Case for scandalous words, and that the defendant procured the plaintiff to be arrested for felony, and the jury gave one

shilling damages; the plaintiff shall have full costs. 2 Ld. Raym. 1589. 2 Kel. 71, 72. 2 Barnard. K. B. 113.

Gaffer for defendant.

22 & 23 Car. 2. c. 9.

Lee econtra for the plaintiff.

* P. 372. Curia.

IN an action on the case for these words spoke of the plaintiff, viz. "Thou art a villain and thief;" *quorum quidem verborum propalatione* the plaintiff was not only much damnified in his fame and reputation, *verum etiam arrestat' fuit* by procurement of the defendant, and carried before a justice of peace and there imprisoned, &c.

Upon Not guilty pleaded, the plaintiff had a verdict, and one shilling damages; and now the question was, whether he should have full costs; and it was insisted, that he should have no more costs than damages, for 21 Jac. by the statute 22 Car. 2. it is enacted, That in all actions of trespass, assault and battery, and other personal actions, wherein a judge shall not certify upon the back of the record, that a battery was proved, or the title of the lands chiefly came in question, if the jury find under forty shillings damages, the plaintiff shall have no more costs; and this being an action on the case for words, is a personal action, and the jury having given but one shilling damages, the plaintiff shall have no more costs.

It was argued for the plaintiff, that in this case full costs ought to be given, because the action is not only for words, but the plaintiff expressly averred, that the defendant *procured him to be arrested for felony*, which is a distinct fact laid, besides the words, and not by way of aggravation; but if it was, there is * no case to prove that full costs ought not to be given.

" If the fact that comes under the *verum etiam* is only laid in
" aggravation of damages, so that the words are the gist of the
" action, then the plaintiff can have no more costs than damages;
" but if it be laid as a distinct fact for which another action might
" be

Term. S. Trin. 11 Georgii, 1725.

“ be brought, then he shall recover full costs. *Anderton v. Buck-*
“ *ton, Hil. 5 G. B. R.* Actions of *scandalum magnatum*, and for
“ flandering a man's title, are actions for words; and yet not with-
“ in the statute of 21 Jac. c. 16. nor the statute intended only to
“ prevent frivolous actions for words.

It is true where a *trespass* is laid with a *per quod*, &c. as for in-
stance, *per quod servitium*, &c. or *per quod consortium uxoris amisit*, there
whatever comes under the *per quod* must be proved, otherwise the
plaintiff cannot have a verdict, because that is the gist of the action;
but in the principal case the action is founded on the words spoken,
and the procuring the plaintiff to be arrested for felony is laid in
a different count, and the defendant is found guilty generally; there-
fore the court inclined that the plaintiff should have full costs.
See *Postea*.

* Moorfoot *versus* Chivers.

* P. 373.

UPON a motion to set aside an *execution*, the case was, that
a writ of error was allowed about two of the clock in the
afternoon, and about the same time the execution was served; now
it was insisted, that from the time of the allowing the writ of error,
the hands of the court are tied up, and if so, the execution is ir-
regular, and ought to be set aside.

Writ of error
sued out, and
allowed be-
fore the exe-
cution was
served, is a
superfedeas,
though the
defendant had
no notice of it.

All which was admitted on the other side, if notice had been gi-
ven of the allowance of the writ of error before the serving the ex-
ecution; otherwise it is regular; but here the plaintiff in the writ
of error did not give the defendant any *notice*, that it was allowed.

2 Ld. Raym.
1395.
Stra. 631.
See Andr.
244.

The court was of opinion, that if the plaintiff in error could shew
that the writ was sued out, and allowed before the execution was
served, it must be set aside, though the defendant had not any no-
tice of it.

Curia.

Welsh *versus* Craig.

IN an action of debt on a *promissory note*, the defendant demurred
to the declaration; and the question was, whether the action of
debt would lie: it was said, that it would not lie *against the endor-*
ser, but that it would lie against the *drawer*.

Debt will not
lie upon a
promissory
note, but an
indebitatus
assumpsit.

Now by the statute 3 Annæ it is enacted, *That all notes signed*
by any person, promising to pay to another, or order, or bearer, the
money mentioned in such note, shall be construed to be due and payable to
such person to whom it is made payable: but though it is due and pay-
able to the person, a general *indebitatus assumpsit* will not lie for it,
for want of a *consideration*; for a bill of exchange is only an evi-
dence of a promise to pay, and is no more than *nudum pactum*, but
a general *indebitatus assumpsit* will lie against the *drawer*, not upon

Stra. 680.
3 & 4 Annæ,
cap. 9.

the custom of merchants, *but for so much money received to the plaintiff's use*, and the plaintiff may give the note in evidence.

" The court were clearly of opinion that no action of debt would lie on a promissory note, declaring thereon; but the plaintiff might have brought an *indebitatus assumpsit*, declaring generally, and so have given the note in evidence. By the custom of merchants no remedy was given on foreign bills of exchange, but by action on the case. The statute of 9 & 10 W. 3. c. 17. has given the same remedy to inland bills, and the 3 & 4 Ann. to promissory notes. An *indebitatus assumpsit* will not lie on a bill of exchange. However the court gave the plaintiff leave to discontinue on payment of costs.

* P. 374.

* Vaughan *versus* Evans.

The defendant who lived in London was served with process out of the court of grand sessions in Wales, and not appearing, his lands were sequestered, but a prohibition was granted.
2 Ld. Raym. 1408.
Stra. 630.

IN a *prohibition* to the court of grand sessions in *Wales*; the case was, one *Evans* had a mortgage of lands within the jurisdiction of that court, which lands were afterwards purchased by one *Vaughan*, as he pretended, and he got into possession by undue means.

Then *Evans* the mortgagee filed a bill against him in that court, and against another who lived within the jurisdiction, but *Vaughan* lived in *London*, and was served with a *subpœna* there; and not appearing upon the service of the *subpœna*, the plaintiff *Evans* procured a sequestration of this land, which lay within the jurisdiction of that court, and then, and not till then, *Vaughan* moved for a prohibition.

And it was now argued, that it ought not to go, because it was absolutely necessary to make *Vaughan* a defendant jointly with the other who lived within the jurisdiction.

Besides, the court of *Grand Sessions* is a court of original jurisdiction, though circumscribed as to place, and this being a personal process, may be as well served in *London*, as the process of the court of Chancery may be served in *Paris* or *Dublin*, or elsewhere out of this realm, or the process of the court of Chancery may be served here, which is done every day.

It is true, that court cannot issue an attachment, or any other process for a contempt out of their jurisdiction, which may be a reason for sequestrating the lands within their jurisdiction, until the party shall obey their process. And this being the method of superior courts, it is reasonable the same method should be pursued in this court of *Grand Sessions*; * and the case of *Tranter v. Diggan* is no authority against it, because it did not appear in that case, that the plaintiff had any lands within the jurisdiction.

* P. 375.

Then the court demanded of the counsel, why the plaintiff did not dismiss his bill in the court of *Grand Sessions*, and exhibit a new bill in the court of Chancery here.

Term. S. Trin. 11 Georgii, 1725.

To which it was answered, it would be very hard on the defendant in this prohibition so to do; for if he should bring a new bill here, they would plead the proceedings below in abatement of that suit: besides, if the plaintiff below should dismiss that bill, he must not only bear the expence of all those proceedings, but must likewise pay costs to the defendant for a supposed wrongful proceeding there.

“*Cur.* The court of Grand Sessions have no jurisdiction in this case; for sequestration cannot issue but after a personal notice; and no personal notice can be given to the defendant who lives in *London*; because their process can only be served in their own district, the remedy in this case would be in *Chancery*, which hath jurisdiction over all *England*. But yet *Chancery* hath no jurisdiction into *Wales* or *Ireland*. *Hut.* 59. *Rol. Abr.* 540. Let there be a prohibition.

+ Quære then how to come at both these

defendants, when each lives within a jurisdiction that excludes process out of the other. Sir Joseph Jekyll, Master of the Rolls, said, that the process of the court of Chancery might be served in *Wales*, on a petition; in *Frederick v. Frederick*, heard 25 March 1732.

Blackett *versus* Finny.

UPON a bill exhibited to establish a *modus*, the plaintiff set forth, that this *modus* was payable *on or about the 25th day of April, &c.* which is a void *modus*, because it must be payable on a certain day, as was lately resolved in the case of *Harrison and Clerke*.

A *modus* payable on or about such a day, not good; for the day must be certain.

Besides, it is laid disjunctively in the bill, (*viz.*) That the parishioners of, &c. constantly paid, or ought to pay so much, when it should be constantly paid, and ought to pay, &c. then as to the *modus* for *Sheep*, it is laid, that the parishioners usually paid 4*d.* for every score, and so *pro rata*, but doth not shew what they should have paid for a less number, in case there were not so many as a score.

The defendant put in his answer, and amongst other things admitted, that the *modus*, as set forth in the bill, was payable *on or about the 25th day of April, &c.* but the plaintiff perceiving the faults in his bill, as before-mentioned, moved for leave to amend, and cited the case of *Reynolds v. Rogers*, where the plaintiff suggested a *modus*, but did not lay it payable on any certain day, neither did the defendant in his answer confess any day of payment; so that no certain day of payment appearing, either in the bill or answer, the defendant who was plaintiff in a cross-bill, having * laid it to be * P. 376. payable on a certain day, it was held good.

This is a case where an amendment of these things will not alter the nature of the proofs; and the day being admitted by the defendant in his answer, it is reasonable, that on payment of costs the plaintiff

Curia.

Term. S. Trin. 11 Georgii, 1725.

plaintiff should amend, especially since his right appears on the pleadings; therefore it would be too rigorous not to give him leave to amend, for in such case the decree must be founded on his bill; and if his bill will not support it, tho' a day is confessed in the defendant's answer, he can have no good decree.

Cowper *versus* Spencer.

An informal issue may be amended, but not where no issue at all is joined.

Stra. 641.

Econtra.

Curia.

Cro. Jac. 502.

Dy. 160, 161.

† Rol. Rep. 200.

Cro. El. 752.

Cro. Car. 435.

Curia.

* P. 377.

AFTER a verdict for the plaintiff, it was moved in arrest of judgment, for that no issue was joined in the cause, it being *et hoc petit quod inquiratur per patriam*, then these words should follow, & *prædictus* (the defendant) *similiter* which were omitted.

On the other side it was said, that there is no occasion for amending this issue, because the appearance of the defendant is entered on the *postea*; besides, at the worst, it is only an informal issue, and that is amendable.

In indictments for treason there is no *similiter* entered, and this court must be guided by precedents, whether it is in this case amendable.

And at another day the following cases were cited, to shew that it was amendable, (*viz.*) In *Fitzherbert, Amendment, fo. 32.* an action was brought against several; they all pleaded, and in the replication one only joined in issue by a *similiter*, and yet it was held amendable; and in * *Dyer* the entry was, *et prædictus similiter*, leaving out *the defendant*, and it was held amendable; and in the cases cited in the † margin, mis-entries were adjudged to be amendable; and it was my Lord Coke's opinion, that the misprision of a clerk in a record may be amended; and in the case of *Davis v. Acherly*, in an action on three promissory notes, the defendant pleaded as to two of them, that the *drawee non indorsavit*, and as to the third *non assumpsit* generally, *et prædictus* (the plaintiff) *similiter*; and after verdict for the plaintiff, he was allowed to enter his judgment on the first issue; therefore if any amendment is necessary, it must be in this case, especially since it is plain by the *postea*, that the defendant appeared.

In every material issue joined, there must be a verdict on one side, otherwise there can be no judgment, and the plaintiff would now have judgment for damages on a verdict found on an *informal issue*, as he alleges it to be, but on *no issue* joined, as the defendant says; now there is a difference between an immaterial and an informal issue joined, and where there is no issue at all joined; and the cases cited in the margin are, where the issues were informally joined; as where it is said in the entry *et prædictus defendens similiter*, where it should be *prædictus* (the plaintiff) *similiter*, in which case the issue is tendered by the defendant; but in the principal case the issue was tendered by the plaintiff, and never joined by the defendant;

Term. S. Trin. 11 Georgii, 1725.

dant; so there was no issue at all, which seemed to the court not amendable.

Turner *versus* Mosse.

WRIT of error on a judgment given in the Common Pleas in an action on the case; the error assigned was, for that there being but one defendant, the plaintiff had declared *pro eo videlicet quod cum ipsi idem* the defendant, &c. instead of *ipse idem*, &c. Where a word is surplusage.

But the judgment was affirmed, for the word *ipsi* is but surplusage; and if it had been left out, the declaration would have been good without it. Curia.

The King *versus* Venables.

TWO justices made an order to *suppress an ale-house*, upon the statute of 5 & 6 Ed. 6. c. 24. which being not observed, the justices at the sessions made another order in this form: it being made only to appear to us that *J. Venables* hath acted contrary to the former order, it is hereby ordered that he be committed to the county gaol, there to remain for three days, and till he enters into a recognizance with two sureties no more to sell ale, &c. Order good, though no summons set forth in it.

Which last order being removed into this court,

Reeve moved to quash the same.

The exception to it was, because it doth not appear in the order, that the defendant *was duly summoned*, so had no opportunity to defend himself; for if he had been summoned he might have shewed some cause against the making this order; as for instance; he might have a licence from other justices to sell ale in the mean time. 2 Ld. Raym. 1405. Fortesc. Rep. 325. Stra. 630. Cal. of Set. and Rem. 122. pl. 163. Sess. Cal. 267. pl. 210. Ante 3, 101, 154.

* A summons is necessary in all convictions. And though this is not an order of conviction, yet it is not merely to carry the former order into execution; because some new fact must be proved as a ground for this punishment; and natural justice requires, that the defendant should be *summoned and heard* before he is condemned. * P. 378.

And so it was held in the case of *The Queen v. Dyer*, which was a conviction on the statute for * imbezilling yarn, setting forth that whereas complaint had been made to T. S. and E. G. &c. and whereas the defendant was duly *summoned* to appear before them, and by virtue thereof did appear on *Tuesday* the 17th day of *April*, whereas the 17th day of *April* was on a *Friday*; and for that reason the conviction was quashed; for it was held, that a summons was necessary, and that the time to appear upon such summons was impossible, because there was no such day as *Tuesday* the 17th of † Salk. 181. * 7 Jac. 1. cap. 7.

Term. S. Trin. 11 Georgii, 1725.

April, therefore it was as if there had been no summons at all.
Fortesc. Rep. 203. And in the case of *The Queen and Green, Hil. 12 Ann.* "A conviction for selling bread contrary to the assize was that the defendant *debito modo summonitus fuit & non apparuit*; and the court held that the summons itself ought to have been set out; for they would not intend a good summons."

Econtra.

It was argued by *Fazakerly* against the defendant, that in convictions of this nature, it is never necessary to set out, that the defendant was *summoned*. The case in *Salk. 181. pl. 1.* is different; for if a bad summons is shewn, the judges cannot intend a good one. *Rex v. Clegg. Mich. 8 G. (ante fo. 3.)* *Rex v. Theed* "A conviction upon the candle act, which gives the officer power to enter in the day-time by himself, or in the night with a constable; and the conviction only said *that the officer * entered*, not specifying whether in the day or in the night, which was an objection taken to the order, but over-ruled; because the court would intend the entry lawful."

* In that case it was alledged in the conviction, that he "entered lawfully."

See ante 320.

There is a difference between judicial and ministerial acts, for in the one, all things shall be intended regular till the contrary appears: now, the *suppressing an ale-house is a judicial act*; for by the statute the justices of peace have a judicial power to suppress them *ad libitum*: and therefore the court will intend that the defendant was *duly summoned*. But in ministerial acts it is otherwise; for in such cases all must appear to be right, and nothing shall be so by intentment: as for instance, in the return of a *mandamus*, all must appear to be regular, because the returns are made by ministerial officers.

Curia.

"*Raymond Ch. Just. Rex v. Clegg* was never determined: but the court then said that the objection had never prevailed; there is a great difference between setting out a bad summons and no summons at all. In the first, there is no room to suppose a good summons; otherwise in the latter case; for if the justices made the conviction without a summons, they are liable to an information; must we presume the defendant was not summoned? No instance where an order was quashed for this exception, whether an appeal lies or no, makes no difference; because the order must appear good on the face of it.

"*Fortescue Justice*: Since judges had jurisdiction, we will not presume they acted against their duty; this objection never prevailed; it differs from a bad summons shewn.

"Afterwards, on deliberation, the order was confirmed.

* The

* The Mariner's Cafe.

* P. 379.

LIBEL in the court of *Admiralty* for *mariners wages*, the plaintiff suggested for a prohibition, a contract reduced into writing for the wages; but the prohibition was denied, for the court always indulges mariners to sue in the Admiralty, because by the course of that court, many of them may join in the suit, and it is the cheapest and most expeditious method to recover their wages; if there is any special contract as is now suggested, the defendant may plead it in that court; and if they do not allow that plea, then it may be a proper time to move *B. R.* for a prohibition; for if it should be granted before the plea is disallowed, it is a prejudging the justice of that court.

Libel for mariners wages, a special contract was suggested, but a prohibition was denied to the court of admiralty.

Beach versus Hobbs.

IN this case it was ruled by the court, that to leave a declaration in the office before the *essoin-day* of the term is a compleat delivery thereof, if notice is given in writing to the attorney on the other side, and he refuses to pay for the copy; but all attornies ought to deliver a copy of the declaration to the defendants attornies where they are known, and willing to pay for it; but if not known, or refusing to pay for it, then it must be filed in the office before the *essoin-day* of the term, and the attorney for the defendant must have notice of it before the *essoin-day*, otherwise he shall have an *imparlance* of course.

To leave a declaration in the office before the *essoin-day* is a good delivery.

Anonymus.

IN *replevin* the defendant justified the taking the cattle *damage-feasant*, and now moved to stay proceedings on bringing into court what was due with costs.

In *replevin* the court will not stay proceedings upon bringing in what is due for damages.

If you bring in what is due upon the *replevin bond*, proceedings shall be stayed, but if it is to stay proceedings on payment of what is due for damages, it shall not be granted, because the court hath no rule to guide them in such case; but it is otherwise for rent, for that is certain.

Curia.

* *Cambridge versus Lea.*

* P. 380.

ERROR on a judgment in an action brought on a *policy of insurance*, and the error assigned was, for that after the plaintiff had set forth that the *ship* was laden with goods, and bound from such

False Latin cured by a verdict.

Term. S. Trin. 11 Georgii, 1725.

such a place to such a place, and insured, that *navis prædicta & bona prædicta submersa fuit*: whereas the goods only, and not the ship, were insured.

Curia:

Moor 888.
Vent. 114.

This being only an insurance on the goods, nothing could be given in evidence at the trial but the loss thereof, without which evidence the plaintiff could never have a verdict: and as to the word *fuit*, it is only false *latin*, and cured by the verdict; so the judgment was affirmed.

The King *versus* Harwood.

No good return to a mandamus to swear a churchwarden.
See ante 325. contra.

A *Mandamus* was directed to the defendant as official to the archdeacon of *L.* to swear *T. S.* church-warden of the parish of *H.* who returned that *T. S. non fuit electus*.

“ Issue thereon, and verdict *pro rege*.

“ *Chappel* Serj. moved in arrest of judgment, because the return of *non electus* is a bad return; the archdeacon being no judge of the election. *The King v. Simpson* (ante 325.) *Rex v. Archdeacon of Cardigan*, 8 *W.* 3. 6 *Mod.* 89. *Queen v. Guy*.

“ *Cur.* The return is a void return, the writ of *mandamus* commands the defendant to swear the church-warden, or to return cause why he cannot swear him. Now he may return some causes, as an incapacity; for that he is judge of: but cannot deny the election; for that he is no judge of. The archdeacon is only a ministerial officer, and therefore bound to swear him. The swearing is only matter of form; because a church-warden may act before he is sworn. The office of a church-warden is a temporal office. 6 *Mod.* 18. *Rex v. White*, peremptory *mandamus*, *nisi*.

* P. 381. * The Case of Wivel and Stapleton. Vide ante 68.

THE judgment of reversal given in *B. R.* in this case was afterwards reversed in the house of Lords; for that the residue of the money was not due to the plaintiff until he had made a good and legal tender of the stock, and the defendant had made default; and the plaintiff having not shewn this in his declaration, it was adjudged he had not laid a sufficient breach therein. Afterwards the plaintiff brought another action, and therein laid a proper breach, and the defendant pleaded the former record in bar, to which the plaintiff demurred. *Sed quære quid inde venit.* 2

Baggot

Term. S. Trin. 11 Georgii, 1725.

Baggot *versus* Oughton. Vide ante 249.

AFTER the death of Lord Chief Justice *Prat*, this cause came once more to be argued; and the whole court were of opinion, that the lease of the mansion-house and demesns was void, which opinion was on argument affirmed by the Lord Chancellor, and by him decreed accordingly, and that decree affirmed in the house of Lords upon an appeal.

Pasch. 11 Geo.

Curwin or Colvin *versus* Fletcher. Ante 43.

THIS term the court granted a *respondeas ouster*.

Term. Trin. 12 Geo.

Cowper *versus* Ginger. Ante 316.

“ **R**AYMOND Ch. Just. delivered the opinion of the court,
“ that the writ of error *coram vobis* well lay; for that the re-
“ cord was removed by the first writ of error. The case of *Walter*
“ *v. Stokoe Hil. 1693.* is a case in point; and there no question was
“ made, but that the record was removed by the first writ of error.

* Term. Mich. 12 Geo.

* P. 382.

Phillips *versus* Fish. Ante 371.

“ **N**OW the court, after deliberation, delivered their opinion,
“ that the plaintiff was intitled to full costs; for as this decla-
“ ration is worded, the arrest and imprisonment are charged as *dis-*
“ *strict* acts, for which the plaintiff might have brought a distinct
“ action, and consequently they cannot be esteemed only acts laid
“ for aggravation of damages. *Cro. Car. 163.*

“ Let there be full costs.

Term Mich. 12 Geo.

Warren *versus* Confet. Ante 106, 323.

IN *Easter term* 13 Geo. 1. The judgment of C. B. was affirmed in B. R. by the whole court. For that the action being founded on the articles, and the particular facts being but auxiliary to the deed, the plea of *nil debet* was no good plea.

Term. Pasch. primo Georgii 2.

Shaw *versus* Weigh. Vide ante 253.

The resolution of the court on a case by devise. Fortesc. Rep. 70. 2 Stra. 832. Fitzgib. 17.

RAYMOND Chief Justice. This case stands for the opinion of the court. The term made to the plaintiff in ejectment is expired; and though we cannot restore the party to his possession, yet we may give judgment. The judgment upon this special verdict below was, *quod querens nil capiat per breve*, and we are all of opinion that this judgment ought to be reversed.

The first point before the court is, what estate the trustees have by the will, as no words of inheritance are made use of in the limitation to them.

And we are all of opinion, that the trustees took an estate of inheritance by implication; for the intention of the testator was, they should take such an estate as would support the several trusts in the will; and they being estates of inheritance, the trustees must have an estate of inheritance to support such trusts, as 1 Roll. Abr. 611. but this being given up on the first argument, we need not labour it.

The second point is, what estate the testator's sisters, Dorothy and Anne, took by the will: if they took an estate tail, Dorothy might levy a fine, and suffer a recovery to bar the lessor of the plaintiff, and consequently the judgment below would be good; but if the sisters took only an estate for life, the fine and recovery were a forfeiture of the estate, and no bar to the lessor of the plaintiff.

And we are all of opinion, that the sisters took only an estate for life, with remainders in tail to their issues. For first, after the death of his wife, the testator gives it *in trust for Anne and Dorothy, equally betwixt them, during their natural lives*. Here if it had rested, it would be an express estate for life to them: and then he declares his intention by saying, *They shall commit no manner of waste*. Now can it be said he intended them an estate of inheritance, when he obliges them not to commit any waste? but to proceed; he provides *P. 383. that if the 500l. or any part be paid by his said * sisters, that then they may raise such money by digging of Coals only; so that he restrains their power to digging of coals only: and the power his wife had*

Term. Pasch. primo Georgii 2.

had was to sell, or cut and sell timber, or dig coals, &c. But no such power is given to the issues, because it is plain he intended the sisters should take an estate for life, and the issues an estate in tail; so there was no occasion to give them a power which they had by virtue of the estate given them.

Then the will goes on (*and if either of my said sisters die, leaving issue or issues, &c. then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them*). The question upon this is, whether issue or issues are words of limitation, or a *designatio personæ*. At common law, issue is not a word of limitation in deeds, *Coke 2 Inst. 334.* and in case of an use, the same law; for if a feoffment is made to the use of J. S. and his issue male, this doth not pass an estate-tail: but in wills (*issue*) is sometimes a word of limitation, and sometimes a word of purchase, according as the testator's intention appears in the will.

The case of *Loddington* versus *Kime*, in 3 *Lev. 431.* is not well Ante 256. reported. I heard it argued *seriatim*, and the case was adjudged, that *Jvers Armin* took only an estate for life, and that point remained unshaken in Chancery and the house of Lords, so that *issue* there was judged a good word of purchase, though an estate for life was given to the father of the issue.

The case of *Blackburt* versus *Wells*, Hill 12 *Annæ*, is a strong case; Ante 261. there the devise was to *A.* for life only, and after his death to his issue, and the heirs of such issue; and that was adjudged an estate for life in *A.* and the issue was a word of purchase, though *A.* took an estate for life; and what the court mostly relied on in that case, was the intention of the testator appearing from the words only, and the limitation over to the heirs of the issues.

Now here the intention appears as plainly, that the sisters were to take an estate for life only, as I have partly shewn; then the words survivor or survivors shew the issue were to take by purchase, for survivors cannot relate to sisters, there being but two. And the will goes further (*and their respective issue or issues*) so that the issue of the sisters were to take an estate which were to descend to their issues; and when an estate for life is given to one, and after to his issue, with a limitation over to his issue of such issue, the first takes only an estate for life, and the issue take as purchasers. The case of *Clerk* versus *Day*, reported in *Cro. Eliz. 313.* 1 *Rolls Abr. 832* & *Moor 593.* is to that purpose; yet I doubt none of these books have stated it as it is on the roll, yet *Moor* is the last, and says it was adjudged, and he is a judicious reporter; the other two were young at that time; but as in *Moor*, the testator devised to his daughter * for life, and if she marry after my death, and have issue * P. 384. of her body, &c. then I will that her heir after my daughter's death shall have the land, and to the heirs of their bodies begotten: and it was adjudged that the daughter took only an estate for life, and her heirs an estate of inheritance by purchase.

Term. Pasch. primo Georgii 2.

The case of *King versus Melling* reported in 2 *Lev.* and 1 *Vent.* has been strongly relied on for the defendant. That case I agree is established, but there is no occasion to carry it one jot further; and we are of opinion it does not come up to this case; there is not a limitation over (as in this case) to the issues of the issue: and if *Hale's* opinion is truly reported in that case, he is clear of opinion, if there had been a limitation over to the issues of the issue, the devisee had taken only an estate for life, and the word issue had been a word of purchase.

Another objection is, that if the sisters do not take an estate-tail by the words already mentioned, yet they are tenants in tail by the subsequent words, viz. *And if my sisters die without issue, and their issue or issues die without issue, then, &c.* These words, they say, give them an estate-tail by implication, as in the cases of *Sutton versus Pamon*, and *Langley versus Balwin*, the last of which was in 1707. I answer, in those cases it is limited only to the 1st, 2^d, 3^d, and 4th, so that all the issues that may be, are not comprehended in the words of purchase; and therefore the words (*if he die without issue*) may by implication operate so as to give the father an estate-tail, for the 5th son could not take as a purchaser, because it is only to the 1st, 2^d, 3^d, and 4th son; and then the words, if he dies without issue, then the remainder over: so that as long as he hath issue the remainder cannot take effect; but here the words are general, and take in all the issues.

Ante 260.

The case of *Popbam versus Bainfield* in *Salk.* 236. is ill reported; for the book says it was a devise to *A.* for life, remainder to his first, and so to his tenth son; but the material words (and to all and every other son) are left out; but in *Dyer* 171. it is said that an implication shall never ride over an express limitation, and therefore if an estate is devised to *A.* for life, and after to his first son, and the heirs of the body of such first son, and if *A.* die without issue, then over, in that case *A.* shall not have an estate by implication, because there is an express limitation in tail to his first son.

Another objection is, that this cannot be a *descriptio personæ* as comprehending male and female. I answer it is a good word of purchase, by the plain intention of the testator. There was another point as to the cross remainders, but that is now out of the case, and we are of opinion the sisters were only tenants for life; so the judgment was reversed *per totam curiam*.

2 *Stra.* 805.

(a) See the arguments in *Fitzgib.* 28.
(b) Sir Philip Yelke.

" Afterwards this cause went up into the house of Lords, on a writ of error brought by *William Sparrow* and others, and was
" (a) argued by Mr. Attorney General and Mr. *Bootle* to make it an estate-tail, and by Mr. *Fazakerly* and Mr. *Strange* to make it but an estate for life, and all the judges being ordered to attend
" took time to consider of it, and

Term. Pasch. primo Georgii 2.

- " On 28th April 1729. nine were of opinion that it was but
" an estate for life, viz. *Raymond, Price, Page, Reynolds, Hale,*
" *Carter, Denton, Probyn, and Comyns*; and the Lord Chief Justice
" *Eyre, the Lord Chief Baron Pengelly, and Mr. Justice (c) For-*
" *tescue,* held it an estate-tail. Fitzgib. 30.
2 Stra 805.
Eq. Caf. Abr.
85.
(c) See his
argument in
Fortesc. Rep
82.
- " Before the Lords gave judgment, the learned Bishop of *Chi-*
" *chester, Doctor Hare,* stood up and said he did not pretend to Fortesc. Rep.
90.
" understand the niceties of the law, but this question seemed to
" him very much to depend upon a grammatical construction of
" the words of the will, and perceived that the three judges who
" differed from the rest, seemed to argue from the grammar of it,
" and he was of opinion, that according to grammatical construction,
" he should rather think survivor or survivors should be most pro-
" perly referred to the sisters rather than to the issue; and there-
" upon the house of Lords, *nemine (d) contradicente,* gave judgment
" according to the opinion of the said three judges, and reversed the (a) Many
Lords who
were of opi-
nion to affirm
being gone
against seven.
" judgment given by the *King's Bench.*
- away, the judgment of B.R. was late at night reversed, upon a division of ten Lords
2 Stra. 805.

2016-2017

Page 303

THE TABLE

TO THE

Common-Law Cases

Of 7, 8, 9, 10, 11 & 12 Georgii I.

Abatement. Vide Addition.

1. **O**F pleas in abatement. *Vide* Page 43
2. Misnomer pleaded in abatement to an indictment of treason. 84
3. The bail cannot plead misnomer of the principal in abatement. 289, 290
4. See a *scire facias* against the bail of *John*, when his name was *Thomas*. 113
5. Note the different effect of abating or quashing a writ of error. 317
6. Recusancy pleaded in disability, not allowed after a general imparlance. 43, 381
7. Where one of the plaintiffs dies, if the cause of action survive, the writ or action shall not abate, but such death must be suggested on the roll, as *per stat. 8 & 9 W. 3.* 115

Account. Vide Wager of Law.

1. In account 'against the defendant as bailiff *ad merchandizandum*, wager of law lies not. Page 303
2. *Insimul computassent infra jurisdictionem*, good, though the cause of the account is not so laid. 77

Acres.

1. Where the acres mentioned in a fine or recovery shall be taken according to common computation, and not according to the *stat. de terris mensurandis*. 275, 276

Acetiam. Vide Action 5.

Actions in general.

1. An action will not lie for damage without an injury. 352, 353
2. Yet

The T A B L E.

2. Yet it will lie in some cases for an injury without any special damage. *Vide Page* 52, 272, 275, 351, &c.
3. As in case for shutting one out of a vestry room, who has a right to be there. 52, 351, &c.
4. Whether an equitable interest in the plaintiff be a good consideration to support an action at law. 40, 41
5. The plaintiff may sue out a *latitat* before the cause of action, but cannot declare 'till after it is accrued. 343, 344
6. After a *superfedeas* for not declaring, the plaintiff may bring a new action. 306
7. Where the wife need not be joined in the action with her husband. 199, 341

Action. *Vide Assumpsit, Case, Covenant, Debt, Notes promissory, &c.*

1. Where money is to be paid on bond at several times, an action lies for the whole on a failure at any one time. 56, 57
2. Where a stranger to a deed or promise may bring an action thereon. 115, 116
3. In covenant by two to two to pay by moieties, the action may be brought (by one) against one. 166, 167. *Vide* 242
4. To an action brought against a common carrier, *non assumpsit* is a proper plea. 178
5. Attachment for charging the defendant with too great a sum in the *acetiam*, denied, because the defendant (if damnified) may have his action. 227
6. In a transitory action brought by special original, the *venue* may be changed. 228
7. Two bound jointly in a bond,

and yet the action brought against one held well (*Vide Deeds*). *Page*

242

8. Where an action of the case, and not trespass (*& e contra*) is the proper action. 272, 275
9. An action on a recognizance of bail may be against both the bail, or one only. 295
10. On an indictment and acquittal in *B. R.* no action lies in the *Marshalsea* for a malicious prosecution. 307, 308

Addition. *Vide Abatement.*

1. Where yeoman or husbandman is a good addition, &c. 51, 52
2. To the addition of yeoman the defendant pleaded he was a horner, and held ill, for both are consistent. 51, 52

Administrator and Administrations.

1. In what cases an administrator shall pay costs, &c. as in trover on a conversion in his own time. 109
2. An administrator declares against the heir in the *debet & detinet*, held only a fault in form, &c. 356
3. Where the plaintiff must have a prerogative administration, or take it in that diocese where the judgment is entered, &c. 244
4. Plea by an administratrix, that she had no assets *die impetrationis brevis orig.* where the suit was by bill, is ill. 288

Admiralty. *See Prohibition.*

Affeerment. *Vide Amerciaments.*

Affeer-

The TABLE.

Affidavit.

1. What it is, and how to be made, *Vide Page 298, 299, 301*

Affidavits. See Attachment.

1. On affidavits that the defendant could not get his witnesses (who were sick) at the trial, the estreating a recognizance was stayed, &c. 288
2. On a conviction of perjury, the verdict set aside, because affidavits made that the defendant could not get his witnesses ready. 289
3. Where a negative affidavit shall be preferred to an affirmative. 81, 96

Agreements.

1. An agreement impossible to be performed (at the making) shall not prejudice any person. 51
2. On a disjunctive agreement (to find diet, &c. or pay 10 l.) the money brought into court. 305

Alehouses, &c.

1. Indictment for selling ale, &c. without paying the duty, quashed (for uncertainty). 58
2. Conviction on *stat. 3 Car.* for selling ale without a licence. 174, 175
3. A sessions order against the defendant's selling ale, quashed, because the county was only in the margin. 309
4. Note, the *stat. 5 & 6 Ed. 6. c. 25.* has not given the sessions, or two justices, power to suppress alehouses at discretion. *ibid.*

VOL. VIII.

5. Before an order to suppress an alehouse, it is necessary to summon the party, but not needful to set forth the summons in a subsequent order. *Page 377*

Ambassadors Servants. See Arrests.

Amendments. *Vide Records and Error 8.*

1. A special verdict amended. 48, 49
2. In covenant the *venire* amended, after a writ of error brought. 234
3. Leave to amend a declaration in trover, and to add more counts. 176, 177
4. Attachment against an associate for amending a record after motion in arrest for the same error. 226
5. A *scire fac.* against pledges in replevin, is in nature of a declaration, and amendable. 313
6. An informal issue may be amended, but not where there is no issue. 376
7. A bill to establish a *modus* amended on payment of costs. *ibid.*

Amerciaments. See Customs.

1. Infants, ecclesiastical persons, peers, &c. not ameriabile for not appearing at leets. 297, 298, 300, 301, &c.
2. An ameriament certain is in nature of a customary fine, and may be imposed by the steward of a leet, and need not be assented. 300, 301
3. Where an ameriament is discretionary it ought to be assented, but where it is ascertained by the custom, there it need not be assented. 301

Appearance. *Vide Arrests.*

5 B

Appen-

The TABLE

Apprentices. Vide Parish Settlements.

1. The father and son bound (jointly) that the son (an apprentice) should account, &c. each are bound. Page 190, 191
2. Being bound an apprentice and serving will not make a settlement without inhabiting. 285

Arrests, &c. See Attornies 6.

1. Where one is in custody for not appearing to an action, and also to answer an information, the *commititur* must be on the last recognizance. 194, 196
2. Rule *nisi* to set aside bail-bond, given upon the arrest of an ambassador's servant. 288
3. After an arrest the plaintiff must declare in two terms, or the defendant may have a *supersedeas*. 306
4. A *latitat* may be sued out before cause of action; but the plaintiff cannot declare 'till after. 343

Arrest of Judgment. Vide Judgments.

Assault. See Trespass.

Assets.

1. Of pleading no assets, &c. by an administratrix. Vide Administration. 288

Assignees and Assignments.

1. In covenant for not repairing, brought against the assignee of an assignee, the plaintiff need not set forth the intermediate assignments. 72

Assumpsit. Vide Action, Case.

1. By the endorsee against the drawer on a note, by which he promised to account with T.S. for 50 l. value received, and held good within 3 & 4 Ann. c. 9. Page 362
2. Against the endorser of a promissory note, declaring that the drawer *fecit notam (in scriptis)* not saying he signed it, yet held good within that stat. 307. Vide Statutes.

Attachments. Vide Action 5. Attorney 6. Coroner.

1. In rescous an attachment not to be granted 'till the return of the writ. 110, 342
2. Attachment against an officer of an inferior court for oppression, &c. 95
3. Against the publisher of a libel on the court of B. R. until he produced the author. 123
4. For extortion, and for forcing the plaintiff to take less damages than the jury gave. 189
5. Against parish officers for a contrivance in settling a poor man and his family. 200
6. Against a gaoler for denying to return a *habeas corpus*, and extorting a note from his prisoner. 226
7. Against an associate for amending a record after motion in arrest, &c. *ibid.*
8. Against divers for rescuing a prisoner taken on an escape warrant by 1 Ann. c. 6. 240, 241
9. Against a bailiff for taking insufficient bail. 283
10. On a motion for an attachment, tho' the affidavits produced by the plaintiff are full as to the charge, yet if the defendant deny it by as plain and positive affidavits, no attachment shall go. 81. See 96
11. For

The TABLE.

11. For withdrawing a witness from giving evidence at a trial at the assises on an information against smuglers. Page 81

12. Against a mayor for a frivolous return to a *mandamus*. 336

13. Against a town-clerk (*nisi*) for granting a *replevin* to take goods from a constable, distrained on a conviction of keeping dogs and nets. 268, 209

14. For challenging an array for want of hundredors where the rule was by consent, though no express injunction therein not to challenge. 245, 246

Attornies.

1. An attorney attached and ordered to answer interrogatories for male practice. 109, 110

2. An attorney may be bail if a house-keeper, &c. (though contrary to the rules). 338

3. An attorney attached, and ordered to deliver deeds, &c. though not entrusted with them in the way of business. 339, 340

4. See want of an original assigned for error by fraud of the plaintiff's attorney. 327

5. A warrant of attorney may be filed any time before the defendant pleads. 77

6. See an attachment for arresting an attorney who had brought his writ of privilege. 192

7. But denied against an attorney who had inserted in the *acetiam* more than due, &c. 227

8. May be punished for making up a second record. 243

9. May detain papers 'till he is paid the money for drawing them, &c. 306

10. Where deeds or writings come to an attorney in way of his business, the courts at *Wefminster* will compel him to redeliver them, on paying what is taxed and due to him. And this, though he be no attorney of record of that court, if he practice therein. Page 340

Averment.

1. In *assumpsit ad damnum* 400 l. defendant pleads the statute of limitations. Plaintiff replies he sued out a *latitat* two years before for 150 l. but not averring it to be for the same cause, held ill. 109

2. In an action on a promissory note, the plaintiff set forth that he demanded the money *de eodem C.* (the drawer) but did not set forth that C. drew the note; yet on demurrer held a good averment. 307

Avowry.

1. In an avowry the particular day of entry, &c. was not set forth, yet held good. 52, 53

2. In ejectment the plaintiff must truly make out his title, but so much strictness not required in an avowry. 54

3. Though the lessor in an avowry shew that the lessee is a disseisor, yet the contract between them is sufficient to maintain an action. 54, 55

Award.

1. In debt on bond to perform an award, where the submission was of matters, &c. between the plaintiff and defendant, on *nullum arbitrium* pleaded, the plaintiff shews
2 an

The T A B L E.

an award between the plaintiff and defendant and his wife; yet held good on motion in arrest, &c.

Page 212

2. Where an award is good or not, though not exactly pursuant to the submission. *vide* 212, 213

Bail and Bail-bonds. Vide Abatement 1. and Attornies 2. Capias 4.

1. **B**AIL, in what method to be taken. 187, 188

2. Bail are liable in *B. R.* where the principal dies before the return of the second *scire fac.* 31. *Vide* 340

3. In strictness they are liable on the return of the *capias* against the principal. 31

4. If the plaintiff proceed by debt on the recognizance, they may surrender the principal within eight days after the return of the writ. 340

5. Though the principal be surrendered, and notice given, yet the bail must pay costs 'till the bail-piece is marked; for the plaintiff is only to take notice of the *exoneretur* entered thereon. 281, 282

6. And if the bail did not give notice, it is irregular, and cannot be supplied but by paying costs. 281

7. Proceedings against bail stayed for irregularity, because only four days between the teste and return of the *scire fac.* that had been brought by the plaintiff's executor against the principal. 305

8. How far, and in what cases bail are bound, and how far favoured by the court. 32, 131, 340

9. The first man is only bail *de bene esse*, and bail is not really given 'till the second man enters into the recognizance. 188

10. And tho' this be done before divers judges, it alters not the case. *ibid.*

11. On a writ of error pending in *Cam. Scac.* moved to stay proceedings on a *scire fac.* against the bail. *Page*

129

12. Pending a writ of error, the proceedings against the bail ordered to be stayed, being moved before the return of the second *scire fac.* 130

13. If the defendants in the *sci. fac.* will confess judgment, and enter into a rule to pay the debt, or deliver up the principal within four days after judgment affirmed, the proceedings against the bail to stay. *ibid.*

14. One outlawed for a seditious libel, may be bailed on bringing a writ of error. 177

15. Bail to the action are not discharged 'till a *committitur* of the principal is entred. 194, 195, 196

16. On a *scire fac.* against the bail jointly, a several judgment may be entred against each. 199

17. In *C. B.* there is but one *Sci. fac.* against bail, but there are two in *B. R.* and the first must be return'd *nihil* before the second issues, &c. 227, 340

18. Bail, where they are discharged in *B. R.* on surrender of the principal before two *nibils* returned the *scire fac.* 340

19. See proceedings against the bail stayed, for that the plaintiff had declared for more than was in the *ac-etiam*, &c. (227) 234

20. *Quære* if bail may be on a recognizance of bail by the *stat. 3 Jac. c. 8.* 79, 237

21. Proceedings against the bail set aside, for that the plaintiff died before the return of the writ. 240

22. See a judgment against the bail set aside on their surrender of the principal. 280

23. But

The TABLE.

23. But bail are not to be discharged on surrender of the principal, unless an *exoneretur* be entered on the bail-piece. Page 281, 340
24. See an attachment against a bailiff for taking insufficient bail. 283
25. An action on a recognizance of bail may be brought against one or both. 295
26. A recognizance of bail taken in *London*, and a *scire fac.* thereon to the sheriff of *Middlesex*, is good if the recognizance be enrolled, &c. 290
27. One of the bail was a material witness for the defendant, who therefore moved that new bail might be given, but denied. 321, 322
28. Bail are to pay costs and interest from the time of the judgment had against the principal. 336, see 282
29. Bankruptcy in the principal shall not avoid a judgment regularly obtained against the bail. 348
30. The defendant bound in a bail-bond in *quadrant libris*; held good for 40*l.* on the *stat.* 28 *H. 8. c. 10.* 342
31. In debt on assignment of a bail-bond, the process of arrest, &c. must be set forth in the declaration. 78
32. Where the defendant must enter into a new recognizance of bail on a writ of error. 79
33. Bail for the peace, &c. are not discharged on appearance of the principal, 'till a *committitur* is entered on the recognizance. 194
34. Nor are they discharged, though the principal was taken from them by process of the court; for they might have brought him up, and rendered him notwithstanding. 195
35. The principal and bail cannot join in a plea, nor in a writ of error. 290
36. If the plaintiff be in *Holland*, and make affidavit there, attested by a publick notary, it shall be admitted here, so as to hold the defendant to special bail. (*Qu. the stat. 12 Geo. 1.*) Page 323
37. Rule *nisi* to set aside bail-bond, given upon the arrest of an ambassador's servant. 288

Bankrupts.

1. A farmer is no trader within the statutes of bankruptcy. 46, 48
2. But if a farmer or inn-keeper buys great quantities of wool, hops, potatoes, &c. for sale, *aliter*. 48
3. See the *stat.* of limitations pleaded to an assignee of commissioners of bankruptcy, and held well. 171
4. Bankruptcy in the principal shall not avoid a judgment regularly obtained against the bail on *stat.* 5 *Geo. 1. c. 22.* 348
5. If the principal become bankrupt, the bail must surrender him before the return of the second *scire fac.* 348

Baron and Feme.

1. After an agreement between husband and wife to live separate, the court will not permit the husband to compel her to cohabit. 22
2. The husband alone may have an action for beating his wife. 26
3. See on a question of legitimacy of the children debated, whether the father was married to the mother. 180
4. *Per Cancellar.* Where there is a marriage, and afterwards a divorce for consanguinity, &c. it bastardizes the issue. 182
5. Where the wife shall not be joined in the action with her husband plaintiff. 200, 342
6. Where 5 C

The T A B L E.

6. Where the wife need not be joined with the husband in the action. Page 342

7. She ought not to be joined unless an express promise to be made to her, or that the cause of action arises from her own skill and knowledge. 200

8. Where the husband and wife may declare *ad damnum ipsorum*. 341

9. The husband has no power to confine her. 22

Barratry.

What barratry is; fraud is barratry, but negligence not. 230, 231

Barristers at Law.

A barrister at law being joined with another, hath no privilege to change the venue. 316

Bastards and Bastardy. Vide *Baron and Feme* 3 & 4.

1. An order of bastardy removed by *certiorari*, and quashed for not setting forth that the party was duly summoned, (*i. e.* the summons did not shew for what cause he was to appear). 3, 4

2. The justices of peace have an original jurisdiction in cases of bastardy, and their orders therein, if regular, are conclusive, yet if irregular, a *certiorari* lies, and they shall be quashed. 4

3. A putative father may be charged (by two justices) with a sum in gross, though seemingly contrary to 18 *Eliz. c. 3.* for they have power to take order for relief of the parish, as to what charge it may sustain, as well as what it has sustained. ibid.

4. Bastard children are to be settled where born. (Vide *Parish Settlements*.) Page 170

Bawdy-houses. Vide *Slander*, N^o 3.

Bill of Exceptions.

1. A judge is not obliged to sign a bill of exceptions, unless offered at the trial, and drawn up according to the minutes. 221

Bills of Exchange.

2. A bill of exchange cannot be made payable out of any certain fund. 265, 6, 7.

3. The words *value received* are not necessary in a bill of exchange. 267

4. See of actions brought on promissory notes and inland bills of exchange, *stat. 9 & 10 W. 3. c. 17, &c.* 307, 362, 373

5. *Sir, You are to pay to Mr. I. (so much) out of the money belonging to the governor and company of, &c.* is no bill of exchange, but only a direction to pay, &c. 265

Bills of Middlesex. Vide *Writs, &c.*

Bonds. Vide *Bail, &c.*

1. See debt on a bond for money won at play, *contra stat. 9 Ann. c. 14.* 57 vide 187

2. A bond executed by one at one day, and by another at another day, relates to the first delivery; *aliter* of bail. 188

3. The father and son bound jointly, that the son (an apprentice) should account; each are bound. 191

4. Two were bound jointly, and an action brought against one; held well, 1

The T A B L E.

well, because it did not appear that the other signed and sealed it; and if he did, yet it is not his deed without delivery. Page 242

5. Debt on a bond of 35 years standing, on a *solvit ad diem* pleaded, payment is presumed. 278

6. *Quære* if an indorsement thereon by the obligee, of interest paid, be evidence of such payment. 279, 280

Breach. See **Cave and Debt.**

1. The breach may be assigned in as general words as the covenant is, and not necessary to assign it in the very words, if it be the same in substance. 231

2. In covenant that he would do nothing to molest, hinder, &c. in the quiet enjoyment of lands; breach that the defendant had erected a gate, *per quod* he was obstructed, &c. and on error brought, held well assigned. 318

Bribery. Vide **Corporations** and **Indictment.**

1. A *mandamus* to restore one to a corporation, disfranchised for bribery. 19, 20

2. *Mandamus* to the old churchwardens, to deliver the parish books, &c. denied. 99

3. An information against one for bribery and ill practices in the election of burgesses, &c. 186

4. Bribery is a sufficient cause to remove one from his office, even before conviction. *ibid.*

Bridges.

An information against a county for not repairing a bridge. 119, 120

Brokers.

How brokers were instituted in London in the room of garblers of spices, by *stat. 6 Ann. c. 16.* Page 103

Burroughs and Burgesses. Vide **Corporations.**

1. By whom elections of burrough magistrates are to be. 210

2. Trial at bar denied, because it was a burrough cause. *ibid.*

3. A *quo warranto* information denied, for that there had been a peaceable possession of a burges 14 years. 286, 287

4. Election of a burges not qualified set aside. 35, 36, &c.

By-Laws.

1. Debt on a by-law for exercising the trade of a musician in London, good, if exercised for lucre. 211

2. Whether a by-law of the joiners company, that whoever exercises that trade shall be free of their company, be good, and well returned. *Vide* 267, 268, &c.

3. A by-law, which makes it penal for a freeman to exercise any other trade, entitles him to his freedom in the company of the same trade. 269

Capias & Ca. Sa. See **Execution.**

1. **A** *Testatum capias* founded on a *capias* issued before judgment signed, is ill. 189, 190

2. Where judgment is the last paper day, it cannot be signed till the *quarto die post*, and said that in that case no *capias* can issue till the next term.

The T A B L E.

- term, *sed Cur. contra* (Vide Judgments.) Page 189, 190
3. A *ca. sa.* and *fi fa.* taken out at the same time, the defendant being taken on the *ca. sa.* the *fi fa.* was quashed. 302
 4. A *capias* against the principal, and a *sci. fa.* against the bail, held to be irregular, because only four days between the *teste* and return. 305
 5. If more than the sum due be endorsed on the *ca. sa.* that does not make the writ void; for the stat. 3 Geo. 1. only inflicts a penalty if executed for more. 188

Case. Vide *Asson*, *Assumpsit*, *Slander*.

1. Case lies for keeping one out of a vestry room, so that he could not be present at electing a parish officer. 52
 2. Case for shutting out of a vestry room held not good, because not shewn he had a right to be there. 351
 3. Case by *infirmul computassent infra jurisdictionem* lies, though the cause of the account was not *infra*, &c. 77
 4. A special action of the case lies for representing a tavern as a bawdy-house. 215
 5. Where an action of the case, and not trespass, is the proper action. 272, vide 275
 6. Case lies where damages are consequential to a lawful act, see 272
 7. But where the original act was a tort in itself, there trespass *vi & armis* is the proper action. 275
- See *Trespass*.

Certiorari.

1. Where a *certiorari* to remove an

indictment of murder out of *Wales* is grantable or not. Vide Page 136 to 146

2. A *certiorari* is no writ of right, but grantable or not at discretion. (*Quære*) 331
3. A *certiorari* granted to remove an order of commissioners of sewers for turning out their clerk. 331

Challenges. See *Jurors*.

Charters. Vide *Corporations*, *Customs* and *Pardons*.

Whether a charter which regrants lands, &c. to a corporation surrendered, shall be both a new creation and a confirmation. 358

Chester.

Information for a local offence in that city must be sent by *mittimus* to the chamberlain of the county palatine, to be transmitted to the mayor, and after trial the chamberlain must return it to *B. R.* 328

Churches. Vide *Union*, &c.

In a suit in the spiritual court for seats in a church, a prohibition awarded. 338

Churchwardens.

1. On a *mandamus* to swear a churchwarden, the surrogate made an ill return. 325
2. To a *mandamus* to swear a churchwarden *non fuit electus* is no good return. 380
3. No *mandamus* to new churchwardens to make a rate to reimburse the old ones. 339

Com-

The T A B L E.

Commitments and Contempts. Vide
Attachments and Coroners.

Committiturs. Vid Ball, N^o 15,
and 33.

Conditions precedent, &c. Vide
Covenants, &c.

1. Where a condition is in the disjunctive, and one part thereof is falsified, the plaintiff must have judgment. Page 349
2. The nature and difference of conditions precedent, and of mutual covenants. Vide 40, 41 and 105
3. In executory agreements where the plaintiff declares *pro consideratione inde*; the word *pro* makes a condition precedent, and there neither party can have an action without averring a performance on his part. 42

Confession. Vide **Conviction.**

Conspiracy. See **Indictment.**

1. In an indictment of conspiracy to raise wages, the fact was laid in the town of *Cambridge*, but not said in what county that was; yet held good. 10, 11
2. That though it did not conclude *contra formam statuti* (i. e. 7 Geo. 1. c. 13.) yet held well, because an offence at common law. ibid.
3. Indictment for a conspiracy in giving a man money to marry a poor old woman in order to gain her a settlement. 320

Consultation. See **Prohibition.**

A consultation gives no new power to sue for any thing, but only to pro-

VOL. VIII.

ceed on the very libel already exhibited. Page 2

Continuances.

1. Continuances may be entred at any time to entitle the plaintiff to his judgment. 243
2. In *C. B.* the memorandum in the declaration is always general, without referring to any term, so that the judgment may be supported by an original of a former term, by entering continuances. 284
3. Where continuances are entred from one term to another, no execution can be prior to such entry. 190

Convictions.

1. On a conviction of forgery, a rule to make up the record in order to arrest judgment, was denied. 45
2. Confession of the offence of keeping a greyhound, &c. is a good conviction, though the stat. 5 Ann. c. 14. directs it to be upon oath. 63, 64. vide 208, 209. and 238
3. The defendant confessed himself guilty of perjury, a good conviction, and he was by the court of *C. B.* set in the pillory. 179
4. A conviction of forcible detainer was quashed, the verbs in the adjudication being in the preter, when they should be in the present tense. 65, 66.
5. See divers cases of removal from offices in corporations before, or without any conviction, 101, 102
6. On a conviction by two justices on 1 Geo. 1. c. 48. for destroying fruit-trees, the judgment was *ideo consideratum*, &c. without *quod forisfaciat*. 175

The T A B L E.

- | | |
|--|--|
| <p>7. See a conviction on the stat. 8 <i>Ann.</i> c. 9. for not assisting an excise-officer in weighing candles. Page 319, 320</p> <p>8. Divers objections to a conviction of prophane cursing and swearing, on the stat. 6, 7 <i>W.</i> 3. c. 11. over-ruled. 366</p> <p>9. But a conviction on an information for the like offence was quashed. 55, 58</p> <p>10. Convictions for selling ale without licence, (<i>Vide Alehouses</i>) and 174</p> <p>11. In a conviction on 1 <i>Geo.</i> 1. <i>supra.</i> It is not necessary to specify the punishment inflicted, &c. 175</p> | <p>justice exclusive of himself. Page 358</p> <p>4. Where by the charter the election of a mayor, &c. is to be on a certain day, it cannot be made on a day after. <i>Vide stat. Geo.</i> 1. 129</p> <p>5. Where the election is to be by 26 burgeses, and one is unqualified, the election is void. 36</p> <p>6. But if one unqualified is elected a common council-man, &c. with others that are qualified, it is void as to him only. <i>ibid.</i></p> <p>7. If there be a new election, he who is qualified is duly elected, and not he who has most votes next to him who is unqualified. 37</p> <p>8. Bribery, a good cause to remove one from his office before conviction. 186</p> |
|--|--|

Copyholds, &c.

1. *Q.* Whether a copyhold should be taken by the heir by purchase, or by descent. *Resp.* by descent. 23
2. For where two rights meet in the same person, the best shall be preferred. 23
3. A copyholder before admission has neither *jus in re*, nor *jus ad rem.* (*Quære.*) 352

Coroners.

A coroner being in contempt, was committed. 192

Corporations. *Vide Burroughs, Charters and Quo Warrantos.*

1. Two bailiffs are of a corporation, if one makes a lease of the corporation lands to the other, it is void. 303
2. Where, though the charter of incorporation be surrendered, yet the corporation is not dissolved. 358
3. Whether the King can grant to a corporation a power to administer

Costs. *Vide Bail, Damages and Paupers.*

1. A *scire facias* in error will not lie for costs, without shewing that the judgment was affirmed in *Cam. Scac.* &c. 73
2. No costs to be paid on a writ of error, where the judgment is reversed (*Vide Statutes*). 314, 315
3. Where a writ of error is brought and quashed, &c. the defendant shall have costs. 316, 317, &c.
4. Where costs shall be paid by an administrator, or not. 109
- By an attorney. 307
5. The plaintiff is not to proceed in a new ejectment before he pays the costs taxed on the first. 225
6. Where the jury gave but 12 *d.* damages, yet full costs awarded, notwithstanding 22 & 23 *Car.* 2. c. 9. 371
7. On a bill to establish a *modus*, leave given the plaintiff to amend on payment of costs. 375, 6
8. On

The T A B L E.

8. On leave to amend a *venire* after error brought, the plaintiff in the original action is not to pay costs (*nisi*, &c.) Page 234

9. An attorney to pay costs and damages for not delivering up deeds he received on a special trust, &c. 306

10. Where the fact laid in a declaration (for words) by way of aggravation, as a consequence of the words would bear an action independent of the words, full costs shall be given; but not where the words alone are the gist of the action. 372

Covenants. Vide *Action* 3. and *Breach*.

1. In covenant brought by the assignee of an assignee, the plaintiff need not shew the intermediate assignments. 72

2. On a covenant by two to two, to pay by moieties, the action may be brought against one of them. 166, 167

3. Covenants to transfer stock, vide *stat. 7 Geo. 1. sess. 2. c. 1. sect. 8.* (Vide *South Sea Stock*, &c.) 40, 42, 173, 232

4. Covenant to pay all taxes, &c. on lands, rates to the church and poor are not within it. 314

5. Covenant for quiet enjoyment, and that he would do nothing to molest him, what is a breach thereof, 318

6. Covenant by father and son, that the son, being an apprentice, should account; the action may be against both. 190

7. Where covenants are both joint and several, the action may be brought against one or both. 167

Covenants mutual. Vide *Conditions*.

1. What are mutual covenants, and what not. Vide *Page* 40, 41, 69, 70, 105, 294, 295

2. Where covenants are mutual, a request to perform, or a tender, is not necessary. 173

3. Tender of performance how to be pleaded in such covenants. 70, 294, 295

4. Mutual covenants cannot arise upon a deed poll, (*Quære*). 41

5. Covenant on a deed poll for *South-Sea* stock. 40, 68, 105, 218, 292

Cursing and Swearing. Vide *Convictions* 8 and 9.

Customs. Vide *London*.

1. *Quære*, Whether an ancient custom may be good against the King's charter. 291, 292

2. Customs, what are good or not, and how to be pleaded, &c. Vide 297 to 302

3. Where an amerciamment is discretionary it is to be affirmed, but not if it be ascertained by custom. 301

Damages. Vide *Costs* 6, &c.

1. **B**EFORE the *stat. of Gloucester*, no damages were in any real action. 25

2. By the *stat. of Merton, c. 1.* The widow in a writ of dower recovers the value of her dower in damages from the death of her husband to the day she recovers (*i. e.* has judgment.) *ibid.*

3. Damages may be given to the defendant in dower, although he has pleaded *uncore prisi*, &c. *ibid.*

4. Damages

The T A B L E.

4. Damages for words spoken, where of some are not actionable, may yet be assessed entire. *Page 26*
5. Where the jury may sever the damages for which the plaintiff has declared entirely. *78*
6. In trover and actions for damages only, no leave to bring the thing into court, *contra* in *detinue*. *176*
7. Where a writ of inquiry of damages may be set aside, and where not. *197, 213*
8. Motion in arrest of judgment, for that the jury gave excessive damages, denied. *296*
9. In trespass for entering the house of one, and taking the goods of another, *ad dampnum ipsorum* is ill. *370. Vide Baron and Feme.*
10. In replevin no stay of proceedings on bringing in what is due for damages. *379*

Debt. See By-Laws, Award.

1. Debt on a bond given for money won at play, (*Vide stat. 9 Annæ c. 14.*) *57*
2. Debt for keeping an engine for destroying the game on the *stat. 8 Geo. 1. c. 19, &c.* *238*
3. Debt on a bond of 35 years past, on *solvit ad diem* pleaded, payment is presumed. *278*
4. Where a note under hand shall be no discharge of a debt contracted before. *290*
5. Debt will not lie on a promissory note, but *indeb. assumpsit* will. *373*
6. Debt on *stat. 6 Ann. c. 16.* for acting as a broker in London, without being admitted. *103, vide 211*
7. Debt on a judgment on a recognizance of bail may be brought against one or both. *295*
8. In debt by an executor against a sheriff for an escape, administration

must be taken in the diocese where the judgment was entered. *Page 244*

Debet and Detinet.

1. An administrator declares against an heir in the *debet* and *detinet*; this is only a fault in form. *356*
2. And no advantage to be taken of it but on a special demurrer. *ibid.*

Declarations. Vide Action, Amendment, Averment, Case, Covenant, Debt and Pleas.

1. It is not sufficient to deliver a declaration against a prisoner to the turnkey, unless it be first filed in the office. *227*
2. Proceedings against the bail stayed, for that the plaintiff had declared for more than was in the *acetiam billæ*. *234*
3. After an arrest the plaintiff must declare in two terms, else the defendant may have a *superfedeas*. *306*
4. But the plaintiff may bring a new action, for his debt is not thereby lost, but only the former action gone. *ibid.*
5. In debt on assignment of a bail-bond, the process of the arrest must be set forth in the declaration. *78*
6. So on a promissory note against the drawer, it must set forth notice of non-payment by the indorser. *43*
7. In case for keeping one out of the vestry, the declaration must shew he had a right to enter. *354*
8. Where husband and wife may declare *ad dampnum ipsorum*. *341 vide 200*
9. By demurring to a declaration, nothing is confessed but what is well alledged therein. *354*

10. De-

The T A B L E.

- | | |
|---|---|
| <p>10. Declaration by an administrator against an heir in the <i>Debet</i> and <i>Detinet</i> (Vide <i>Debet</i>, &c.) Page 356</p> <p>11. Declaration in trespass for breaking the house of one, and taking the goods of another, (Vide <i>Damages</i> 9.) 370, &c.</p> <p>12. To leave a declaration in the office before the effoin-day, is a good delivery. 379</p> <p>13. But the defendant's attorney must have notice of it in writing before the effoin-day, or an <i>imparlance</i> is of course. <i>ibid.</i></p> <p>14. In covenant for not repairing against the assignee of an assignee, the plaintiff need not shew in his declaration the intermediate assignments of the lease. 72</p> <p>15. If the plaintiff alleges in his declaration <i>indentur. fact. inter partes</i>, it is sufficient, and the sealing and delivery need not be shewn; for <i>indentur. fact.</i> implies it. 34</p> <p>16. The agreement was in the copulative, but the declaration alleges the breach in the disjunctive, yet held good after verdict. 238</p> <p>17. Note, If on a demurrer the declaration appears to be bad in substance, no implication in a bad plea can mend it; <i>aliter</i> (it seems) after a verdict. 70, 71</p> <p>18. And where the issue is immaterial, the defendant shall not take advantage of a bad replication, if the declaration be good. 173, 174</p> | <p>3. An attorney ordered to deliver up deeds, &c. though not intrusted with them in the way of business. Page 339</p> <p>4. Of the effect of a deed poll. 41, 42</p> <p style="text-align: center;">Demurrers. Vide <i>Declaration</i>, <i>Issues</i> 4.</p> <p>1. By demurring to a declaration, nothing is confessed but what is well alleged therein. 354</p> <p>2. And no advantage can be taken of a fault in form therein, but on a special demurrer, (Vide <i>Debet</i>, &c.) 356</p> <p>3. Demurrer to an indictment for a riot for an insensible word therein, over-ruled as <i>surplusage</i>. 327</p> <p>4. Demurrer to a plea in abatement of an indictment of treason, and no time given the prisoner to join therein. 84</p> <p>5. The condition being in the disjunctive, the defendant pleads performance of one part, which being traversed, the defendant demurs. The traverse is confessed by the demurrer, and the plea in that part alleged being falsified, the plaintiff must have judgment. 349</p> <p>6. Demurrer to a declaration in covenant, to pay money for <i>South-Sea</i> stock to be transferred on 21 <i>Sept.</i> &c. because not shewn that the plaintiff staid to transfer it the last hour of the day, and judgment <i>pro defendente</i>. 219</p> <p>7. Demurrer to a <i>scire fac.</i> against pledges, which set forth a judgment recovered against them in <i>C.B. prout patet de recordo</i>, when there was only a transcript thereof there. 314</p> |
|---|---|

Deeds and Writings.

1. Signing and sealing does not make it a deed, it must be delivered by the party. 242
2. Where deeds, &c. are delivered on a special trust, the party cannot detain them. 306

The T A B L E.

Descent. Vide Devise and Heir.

When two rights meet in one person, *i.e.* by descent and by devise, the descent being the more noble, takes place. Page 23

Detinue. Vide Damages 6.

Devise. Vide Legacies.

1. Where copyhold lands devised shall be taken by purchase or descent, (Vide Copyholds.) 23
2. Where one may take a fee-simple by devise, without the word *heirs*. Vide 253, 254, &c.
3. In what cases devisees take estates for life, with contingent remainders. *ibid.* &c.
4. See and note the learning of executory devises, and contingent and cross remainders. 254 to 263, and 381, 382
5. An executory devise to two, on contingency of a third person's dying in both their life-times (*Ans* issue.) 346, 347
6. A devise to one for life, and after his death to the issue of his body, &c. is an estate-tail. But a devise to one for life *only*, and if he die without issue, remainder over, is only an estate for life. 263
7. *A.* devised his messuage in *H.* to *B.* and his heirs, and all the rest and residue of his lands to *C.* and his heirs; *B.* died in the life of *A.* *Quære* if this lapsed legacy be by the general clause carried over to *C.* as residuary legatee, or shall descend to the heir at law. 221, 222
8. See a devise of gavelkind lands. 208

Discontinuance. See Error.

Disfranchisement. See Corporation.

Distresses. Vide Replevins.

Dower. Vide Damages 2 & 3.

1. Dower of three tenements not good, by reason of the incertainty of the word tenement. Page 355
2. In dower *uncore prift* is a good plea, where an actual assignment is made. 25

Ejectment.

1. **T**HE method of proceeding therein in *B. R.* 118
2. Ejectment lies not of a fishery, nor *de piscaria* in such river; but it lies *de (tanta) terra aqua cooperta.* 277, 8
3. In ejectment judgment cannot be entred upon confession of the casual ejector. 109
4. Error in *Cam. Scac.* will not lie on a judgment against the casual ejector. 118
5. The plaintiff is not to proceed in a new ejectment, before he has paid the costs taxed on the first. 225, 226
6. In ejectment for non-payment of rent, the plaintiff had judgment, but proceedings were stayed on bringing in the rent and costs. 345
7. Where judgment in ejectment is more than a year's standing, a *sci. fac.* must be sued, and notice given. 366
8. On a judgment had in ejectment, the defendant offered to deliver possession, on condition of receiving a declaration, &c. 221
9. Objections in ejectment after verdict over-ruled. 303

Election

The T A B L E

Election of Officers. See Corporations.

1. Where a void election of one not qualified, was held good for one qualified. Page 36, 37
2. Of the right of election of borough magistrates by inhabitants and out-dwellers. 210

Error. Vide Amendment 2. Ejectionment 4.

1. Where a writ of error lies, or not. 27, 28, 29
2. On a *mandamus* for an archdeacon to be restored to a seat in the choir in *Dublin*, a writ of error will not lie. 27
3. A writ of error is brought by two, and one dies pending the writ, how the plaintiff may sue execution. 108
4. A writ of error is no *superfedeas*, unless the plaintiff in error puts in bail. 121
5. Pending a writ of error, proceedings against the bail are stayed. 129, 130
6. A writ of error *coram vobis* is a good *superfedeas* after it is allowed. 147
7. Where error *coram vobis* lies, or not. 147, 1317
8. Want of a bill filed, assigned in parliament for error. 283, 284, 368
9. After *in nullo est erratum* pleaded, is never admitted to amend general errors. 304, 305
10. On a judgment in debt against two defendants jointly, both must join in a writ of error. 305
11. No costs on a writ of error where the judgment is reversed. 314
12. Judgment was against two, and a writ of error brought by one, was quashed, the defendant shall have costs. 316, 317

13. Where want of an original was assigned for error by fraud of the plaintiff's own attorney. Page 327
 14. A writ of error sued and allowed before execution served is a *superfedeas* though the defendant had no notice of it. 373
 15. Whether want of an original returned by the sheriff is error, if one be filed on the roll, and so certified. 30 vide 327
 16. Error for variance between the original and the declaration; but on producing the record it was right, but of another N^o roll. 243
 17. Error for that there being but one defendant, the plaintiff had declared *quod cum ipsi idem*, but held *ipsi* to be but *surplusage*. 377
 18. Error for that the plaintiff had not set forth in his declaration, that the drawer of a promissory note had notice of the default of payment of the indorser. 43
 19. On motion to amend a *venire* after error brought, the defendant in error shall not pay costs, unless the defendant will wave his writ; for then it will appear to be brought for this fault, and not for delay. 234
 20. Where a *non prof.* is entered without a *misericordia*, it is no error. 198
 21. Where bail is required in error on a recognizance of bail. Vide 237
 22. Of writs of error to reverse outlawries. Vide Tit. Outlawry.
 23. Of writs of error to the King's Bench, &c. in Ireland. Vide 1, 5, 6, 27, 184, &c.
 24. Error from Ireland, if the defendant does not appear at the return of the writ, it is no discontinuance. 184, 185
 25. For he need not appear 'till errors assigned, and he may by *sci. fac.* compel the plaintiff thereto. 185
- Error

The TABLE.

26. Error to reverse a judgment in ejectment after a verdict. Objections over-ruled. Page 303

Escape Warrant.

1. One taken on an escape warrant after a day rule, detained. 80
2. Attachment against divers, for rescuing one taken on an escape warrant. 240, 241
3. A judge of either court, where the commitment, action, judgment or execution is, may grant such warrant. 240, 241

Estoppel.

1. What shall be taken to be an estoppel or not. *Vide* 33, 34, 323, 324
2. Parties to an indenture are estopped to deny essentials, but not descriptive words, &c. 311, 312
3. As if a close be demised, called *Lane's Meadow*, the party is not estopped to say it is arable. *ibid.*
4. So if a close be demised containing 500 acres, he is not estopped to say it contains less or more. 313
5. It is a general rule, that *nil debet* is no good plea to an action founded on a specialty, or on a record, for there the defendant is estopped, unless mixed with other facts, as fraud, &c. 324
6. Where the defendant covenants to perform all covenants in a former lease, &c. (recited) he is estopped to say there were no such covenants in the former lease, &c. 34

Evidence. *Vide* Witnesses.

1. Papers found in a prisoner's custody read as evidence against him. 88, 89

2. Parol Proof of what the prisoner confessed before the council, not admitted, except his confession were signed. Page 89

3. Where the defendant may plead the general issue, and give the special matter in evidence. 120
4. Where a plea is in the affirmative, the proof lies on the defendant. 180, 181
5. What comes under the *per quod* in trespass must be proved. 372
6. Note the parson's evidence to prove a woman a concubine rejected, for he would have married her himself. 181
7. 2. If an indorsement by the obligee of interest paid, be evidence of such payment, &c. 279, 280
8. See the construction of the stamp-act, 5, 6 W. 3. deeds not to be received as evidence till stamped. 365
9. An answer in Chancery not to be evidence at law, either for the party or against a third person. 181
10. Nor any proceedings in the spiritual court where the title of lands is in question. *ibid.*
11. An exemplification of an entry of goods at *Rotterdam*, no evidence. 75
12. Yet a copy of an agreement in *Holland*, attested by a publick notary, good evidence. 322, 323
13. Cohabitation allowed to be evidence in favour of legitimation. 180

Exchange. *Vide* Bills of Exchange.

Excise Officers. Vide Conviction 7.

Execution. Vide Error 4. *Capias & Fieri Fac.*

1. Execution of a criminal in *Middlesex*, though the fact committed in *Essex*. 94
2. An

The TABLE.

2. An execution sued before the defendant's death, may be executed after, without a *scire facias*. Page 225

3. A prisoner is to be charged in execution, within two terms after judgment obtained, &c. Vide Judgments. § 227

4. If judgment be signed after the term, yet it relates to the first day of that term, (except as to purchasers) and the execution ought to be tested accordingly. 310. Vide 225 & 189

5. Error by two, and one dies pending the writ, execution may be without *sci. fa.* 108

Executory Devise. Vide Devise.

Executor. Vide Inventory and Legacies.

An executor was denied the enlarging of time to plead, (the rules being out) unless he would enter into a rule not to plead any judgment obtained after the rules were out. 308

Exposition of Words, &c. Vide Words.

Extortion. Vide Indictments.

1. Attachment moved for against a defendant for extortion, in forcing the plaintiff to take less damages than the jury gave. 189

2. The like against a gaoler for denying to return a *habeas corpus*, and extorting a note from his prisoner. 226

Faculties.

A Faculty granted by the archbishop need not be subscribed
VOL. VIII.

or registred by the chief clerk of the faculties; it is sufficient if done by his deputy. Page 364

False Latin. Vide Words.

Fee-simple.

Where one may have a *fee-simple* without the word heirs. 253

Felony. Vide Indictments and Murder.

1. Where felony may be of goods delivered, &c. 74, 75, 76
2. Felony cannot be of goods delivered to a carrier till the special trust be determined. *ibid.*
3. The goods of a third person stolen out of another's shop, is not felony on the *stat. 10 & 11 W. 3. c. 3.* 165. Vide 370

Feoffments.

1. Where a feoffment is to several uses, &c. the reversion in fee to the heirs of the feoffor, his heir takes by descent; *aliter* in wills. 23
2. See feoffments pleaded. 68, 292

Fieri Facias.

1. Where a *fieri facias* without a *testatum* is not good. 282
2. A *fi. fa.* and *ca. fa.* taken out at the same time, if the defendant be taken on the *ca. fa.* the *fi. fa.* shall be quashed. 302
3. Indictment for a *rescous*, setting forth *quod cum virtute brevis de fieri facias*, and a warrant issued thereupon, he levied the goods, &c. is ill, for the *fi. fa.* must be set forth at large. 357

The TABLE.

Fines and Recoveries.

Where acres are mentioned in a fine or recovery, they shall be taken by common computation, and not by the *stat. de terris mensurandis*.
Page 276, 277

Forgery. Vide Convictions 1.

See on an indictment at the assises, a conviction of forging the stamps, but judgment arrested. 45

Gaming.

1. **D**EBT on bond for money won at play. *Vide stat. 9 Ann. c. 14.* 57
2. Information for gaming on the same statute. 187

Game preserved. Vide Conviction 2.

1. See goods replevied, though distrained on a conviction for keeping dogs, nets, &c. not qualified. 208
2. See debt on a *stat. 8 & 9 Geo. 1. c. 19.* for keeping an engine to destroy the game. 238
3. Upon a conviction hereof before a justice, any person may have debt for the penalty. *ibid. vide 63*

Gaoler. Vide Extortion 2.

Garblers of Spices. Vide Brokers.

Gavelkind.

On a will of gavelkind lands cancelled, the land to descend equally to grandchildren, 208

Guardian.

On a *babeas corpus* an infant was delivered by the court to its proper guardian. Page 214, 215

Habeas Corpus. Vide Guardian.

1. **O**N a *babeas corpus* by one who had been a prisoner two terms, and not tried, he must be discharged. 5
2. Cases of persons brought into court by *babeas corpus*. 214
3. An attachment against a gaoler for denying to return a *babeas corpus*. 226
4. On the suspension of the *bab. corp.* act, the power of B. R. is restrained by particular words. 98
5. A *babeas corpus* for the wife, being carried by her husband by force into the Mint. 22

Heirs. Vide Administrator 2.

1. The heir's title by descent is preferable to that of purchase, &c. 23
2. A *feoffment* to uses, the reversion in fee, to the heirs of the feoffor, his heir takes by descent; *aliter* in wills and devises. *ibid.*
3. Where a residuary legatee shall not take by the will, but the heir. 123, 124
4. Whether a lapsed legacy shall go to such legatee or the heir. 221, 222
5. Where one may take a fee-simple by devise, without the word *heirs*, &c. 253, 255, 256, 7, &c.
6. Where issue of the body is tantamount to heirs. Vide Wills and Words.

Husband and Wife. Vide Baron and Feme, and Habeas Corpus 5.
1 Jeofails.

The TABLE.

Jeofails.

1. **A** Verdict in the *debet* and *detinet*, where it ought to be *detinet* only, is aided by the statute.

Page 356

2. On a policy of insurance, the declaration was *quod navis & bona submersa fuit*, where only the goods were insured, yet held good, and the false *Latin* cured by the verdict.

380

Indebitat. Assumpsit.

An *indebitat. assumpsit* lies on a promissory note, tho' *debt* will not. 373

Indictments. Vide Conspiracy, Felony, Murder and Treason.

1. An indictment, if laid in the disjunctive, is ill for uncertainty. 329
2. The utmost certainty is required therein, so as a conviction may be pleaded to other actions, &c. 58, 296, 329
3. Indictment for conspiring to raise wages, not concluding *contra formam statuti*, yet held good, for conspiracy is an offence at common law. 10
4. Note, the conspiracy was laid in the town of *Cambridge*, not saying in what county, yet held good, *ibid.*
5. A bare conspiracy to do a lawful act, if to an unlawful end, is indictable, tho' no act done. 320, 321
6. Indictments for conspiracies are never quashed. 321. See other matters of *conspiracy*. *ibid.*
7. Of calling over the panel and challenges, &c. in indictments of high treason. *Vide* 86
8. Indictment for piracy in sinking a ship, against the master, &c. 66

9. Indictment for piracy on a commission, according to the *stat.* 28 *H. 8. c. 19. Vide* Page 74, 75, &c.

10. The defendant being acquitted on two indictments of felony, &c. found guilty on a third as a cheat. 77

11. On an indictment of treason, the prisoner before he pleads, &c. is to have his irons taken off. 82

12. Note the exceptions to *Laver's* indictment, and the answers thereto. 83, 84, &c.

13. An indictment of murder removed out of *Wales*, and tried in an *English* county. 135, 136

14. Two indicted of murder, one of them acquitted, and the other found guilty. 164

15. An indictment for stealing the goods of a person unknown. 248, 165

16. On Not guilty pleaded to such indictment, a property must be proved in somebody. 248

17. One tried and found guilty as accessory to buying and receiving stolen goods, though the principal being afterwards tried, was acquitted on the *stat.* 5 *Ann. c. 13.* 264, 265

18. An indictment quashed, it being *presentat' existit quæ (for quod) billa est vera.* 296

19. On an indictment and acquittal in *B. R.* no action to be in the *Marshalsea*, &c. for a malicious prosecution. 307, 308

20. Indictment for secreting a woman pregnant *illegitimo fœtu* is ill. 336

21. In an indictment for a *rescue*, the *fi. fa.* or *ca. fa.* &c. must be set forth at large. 357

22. In treason the *venire facias*, not to be read, &c. after a verdict. 91

Infants.

The T A B L E.

Infants. Vide Guardian.

1. An infant defendant was admitted *ad prosequend. per prochein amie*, yet good. Page 25
2. See an infant brought in by *habeas corpus*, and delivered to his guardian, though objected he would take in remainder, &c. 214

Informations. Vide Quo Warrantos, and Gaming.

1. Information against a justice of peace for sending one to the house of correction without cause. 45, 46
2. An information against a justice of peace, for not granting his warrant; denied, and the prosecutor ordered to pay costs. 337
3. An information against a burgess, for not taking the oaths at the time of election, not granted. 55
4. Information for profane cursing and swearing, and a conviction thereon, quashed. 58, 59. *Post* 366
5. Information against a mayor, &c. for taxing men who did not live in the corporation. 114
6. Information against the county, for not repairing a bridge. 119
7. Information against a mayor, for bribery and ill practice in electing an officer. 186
8. Information against a school boy for assaulting his master. 283
9. Information against overseers of the poor, for removing a sick person. 326
10. Information for a libel laid in the disjunctive, (*scripsit seu scribi causavit*) is ill. 328
11. See an information against a mayor, &c. for beating the informer, moved the last day but one of a term, but denied a rule to hang

over a magistrate's head for a whole vacation. Page 337

12. Information in nature of a *quo warranto* against a mayor and bailiff, suggesting that no man could be mayor or bailiff of the corporation of *Whitechurch* in *Hampshire* who were non-residents. 350, 351

Inn-keeper.

1. An inn-keeper may detain a horse for only one night's meat, but cannot sell him. 172
2. But if he gives credit to the owner for that night, he shall not afterwards detain the horse. 173

Inquiry. Vide Writs.

1. Where a writ of inquiry will or will not lie. *Vide* 108
2. Where it may be set aside for smallness of the damages. 196, 197
3. In an action for damages, the jury (of inquiry) may mitigate them, or find part only. *ibid.*
4. But in *assumpsit* on a note for a sum certain, or in covenant for paying a sum certain, there the jury cannot mitigate. *ibid.*
5. See a writ of inquiry granted to be executed before the *Chief Justice*, the action being for 20000 *l.* 240
6. Motion to set aside an inquiry, because executed before the money became due. 349, 350
7. A rule to set aside the execution of a second writ of inquiry, because the costs not paid on setting aside the first. 213

Infimus computassent. Vide Accounts.

Inven-

The T A B L E.

Inventory.

An inventory may be falsified at the suit of a legatee, but not at the suit of a creditor. Page 168

Ireland. Vide Error 24.

1. Where the ordinary in *Ireland* may visit a royal foundation there. 183
2. *Trover* lies in *B. R.* here for a conversion in *Ireland*. 322
3. See the case of the King and the Archbishop of *Armagh*, on a writ of error from *Ireland*, Tit. King.

Issues.

1. Where the issue is immaterial, and where the defendant shall not take advantage of an ill replication. 173, 174
2. An informal issue may be amended, but not where there is none, or a void issue. 376, 377
3. What are good or ill issues, &c. 346 and of the issue on *solvit ad diem*. *ibid.*
4. Where the issue will not end the matter, the plaintiff may take advantage of it by a demurrer. *ibid.*
5. Where several issues are joined, a verdict that finds the one and not the other, is not good. 3 Vide *ibid.*
6. Issue of the body. Vide *Hest* 6.

Judgments. Vide Error, and Jurisdiction 3.

1. A rule denied for making up a record with an arrest of judgment on a conviction of forgery. 45
2. In ejectment judgment cannot be entered on a confession of the casual ejector. 109
3. A *testatum capias* founded on a ca- VOL. VIII.

pias which issued before the judgment signed, is ill. Page 189, 190

4. A judgment given the last paper day, cannot be signed till the *quarto die post*, which is out of term. *ibid.*
5. A *sci. fac.* against the bail jointly, but a several judgment against each held good, 199
6. Though a judgment be regularly obtained against a prisoner, he must yet be charged in custody within two terms after; and if he be charged afterwards, the court will discharge him with costs. 227
7. A judgment set aside, because signed within four days, *i.e.* before the *quarto die post*. 237
8. Motion to stay proceedings on a judgment, for that part of the money was paid, but denied, unless the defendant brought all that was due, &c. into court. 236
9. A judgment was given by a judge of assize, after he came to town; but this was by consent. 246
10. A judgment by default is not to be impeached, where the defendant made defence on the writ of inquiry. 289
11. See a judgment against a director of the *South-Sea* company set aside, &c. by *stat. 7 Geo. 1. c. 1. 5.* 291
12. Motion in arrest of judgment, because the jury gave excessive damages, denied. 296
13. A judgment, when signed, shall relate to the first day of the term precedent. (*Vide* 189, 190) 310
14. Where the rejoinder did not answer the replication, the plaintiff had judgment. 343
15. In ejectment for non-payment of rent, the plaintiff had judgment, but proceedings stayed, &c. 345
16. Bankruptcy in the principal, shall not avoid a judgment regularly had against the bail. 348

5 G

17. Where

The TABLE.

17. Where a condition, &c. is in the disjunctive, and one part thereof falsified, the plaintiff must have judgment. Page 349

18. Where judgment is had against the marshal, the profits of the prison shall be sequestred, &c. 350

19. A judgment shall not be vitiated for any error in a word of *surplusage*. 377

20. See judgment set aside on payment of costs, giving a new judgment for security, and pleading to issue immediately. 289

21. Two are jointly bound, the action was against one only; yet after verdict, if it appears not on the record that the other delivered the bond, the judgment shall not be arrested. 242

22. Motion to set aside judgment against bail, denied. 130

Juries.

1. Where the jury may sever the damages for which the plaintiff has delared. 78

2. A special jury is to be by consent, and not to be challenged. 245

3. But see divers precedents of special juries without such consent. 247, 248

4. The high sheriff may return the jury, though the under sheriff be both attorney and bail for the defendant. 247

5. If any lawful objection be to the sheriff, a special jury may be struck by the master without consent. 248

6. Rule for a jury without consent. 229

Jurisdiction. Vide Prohibition.

1. An *infirmul computassent infra jurisdictionem*, held good, though the

cause thereof was not within the jurisdiction. Page 77

2. A judgment of an inferior jurisdiction, *ideo consideratum quod convictus est* is not good, if not said *quod forisfaciat*. 175

3. A prohibition to the grand sessions in *Wales*, for that the defendant living in *London*, was served with process of that court, and not appearing thereon, his lands there were sequestred. 374

Justices of Peace. V. Bastards, &c.

1. An information against a justice for sending one to the house of correction without cause. 45, 46

2. An information moved against another for refusing to grant a warrant, but denied, and the prosecutor ordered to pay costs. 337

3. And note, in judicial acts by the justices, all things shall be intended regular till the contrary appear; but *aliter* of ministerial acts, for there all must appear to be right. 378

See also *Poor's Settlements, Sessions, Alehouses, &c.*

King's Prerogative, &c.

1. **I**N a *quare impedit*, plenarty is no plea to the King's right. 8

2. The King cannot exempt in any case where the subject has an interest, &c. 19

3. The King cannot be devested of any of his prerogatives by the general words of an act of parliament. 8

4. In other cases (*i. e.* not of prerogative) the King's rights are no more favoured than those of a subject. 8, 105

5. Where

The T A B L E.

5. Where an ordinary may visit a college, &c. though of the King's foundation. *Page 183, 184, &c.*

Vide 367

6. The King seized of the advowson of a vicarage, and the bishop of the advowson of a rectory near it; the King's incumbent dying, the bishop united the livings; the King presents another vicar; and on the bishop's refusing him, brings a *quare imp.* against the bishop, and judgment *pro Rège.* *Vide 5, 6, 7, 8*

7. The King cannot pardon or release any rights of the subject that are once vested. *105*

8. Nor will his act of general pardon release any duty given to the subject on a penal statute. *104, 105*

9. And it seems he cannot pardon burning in the hand, &c. upon an appeal (and *5 Rep. 50. contra denied.*) *105*

10. See also the King's power of releasing or dispensing with penalties. *12 to 19*

11. 2. If the King's charter to the college of physicians can exempt them from the militia service. *ibid.*

12. What power the King has to grant charters of exemption from publick services or penalties of statutes. *ibid.*

Latitat. *Vide Writ.*

Leases.

WHERE a lease is to commence from a day to come, that day is excluded. *54*

2. If the lessee enter before the day, he is a disseisor; and if he continue in possession after the day, though by the lessor's consent, he is liable to debt for the rent arrear; for no

act of the lessee shall hurt the contract, &c. *Page 54, 55*

3. A rector makes a verbal lease of his tithes for one year, at so much *per acre*, the lessee lets them to the respective landholders at *6 d. per acre* more: adjudged the lessee is the occupier of the tithes, and not the rector. *61, 62*

4. Of powers to make leases, &c. reserved in *Marriage Settlements*, &c. *Vide 249 to 252. and Tit. Power.*

5. Two bailiffs are of a corporation, if one makes a lease to the other, it is void. *303*

Leets. *Vide Amerciaments, and Quo Warrantos 2.*

Legacies and Legatees.

1. An inventory may be falsified at the suit of a legatee, but not at the suit of a creditor. *168*

2. Where a residuary legatee shall not take by the will, but the heir. *123*

3. 2. If a lapsed legacy shall go to the residuary legatee, or to the heir at law. *221, 222*

Libels.

1. An attachment against the publisher of a libel until he produced the author. *123*

2. One outlawed for a seditious libel may be bailed on his bringing a writ of error. *177*

3. An information for a libel laid disjunctively, *viz. Scripsit seu scribi causavit*, is ill. *328*

4. For libels in the spiritual court, and admiralty. *Vide Prohibition.*

Limita-

The T A B L E.

Limitation of Actions. Vide Actions and Pleadings, and page 109, 171

1. Thirty years possession of a cottage built on the lord's waste, without licence, is a good title against the lord, &c. Page 287

London Customs, &c. Vide By-Laws and Sheriffs.

1. The court will not judicially take notice of the customs of *London* after a sentence in the spiritual court. 176
2. Debt on a by-law for exercising a trade (*i. e.* of a musician) in *London*. 211
3. *Q.* If a by-law of the joiners company in *London* be good, and well returned. 267, 268, 9
4. *Q.* If one free of the merchant taylors company, but exercising the trade of a joiner, is obliged to be also free of the joiners company. *ibid.*
5. How brokers in *London* came to be established on suppressing the office of garbler of spices. 104, 105
6. All defamatory words spoken in *London*, punishable by the spiritual court, may be tried in *London* by the custom there. 115

Mandamus. Vide Quo Warranto and Returns.

1. *A* Mandamus to swear a mayor, &c. 332
2. A mandamus to restore divers disfranchised for bribery, &c. 19, 20
3. Mandamus to the old churchwardens, to deliver the parish books, &c. denied. 98, 99
4. Mandamus to the mayor, &c. of *Carlisle*. 99

5. On a *mandamus* (by an archdeacon to be restored to his seat in the choir, &c.) a writ of error will not lie. Page 27

6. By *stat. 9 Ann.* the prosecutor may plead to, or traverse the facts in the return of a *mandamus*; and the other party may take issue or demur. 28, 29

7. A *mandamus* to choose and swear a mayor, shall be taken *reddendo singula singulis*. 111

8. A *mandamus* was to choose and swear a mayor, &c. but a peremptory *mandamus* denied. 127

9. A *mandamus* to restore *Dr. Bentley* to the degrees, &c. he had taken in the university. 2, 148

10. Several persons cannot be joined in one *mandamus*, to be restored (admitted) &c. 209, 210

11. On a *mandamus* to swear a churchwarden, the surrogate makes an ill return, &c. a peremptory *mandamus* issued. 325

12. See a *mandamus* granted after judgment of *ouster* against the same person on a *quo warranto*. 235

13. A *mandamus* to justices of peace to sign a poor's rate. 335. Vide 344

14. A *mandamus* to proceed to the election of a mayor. 332, 336

15. To distrain for a poor's rate. 10

16. To appoint overseers. 39

17. No *mandamus* to compel new churchwardens to make a rate to re-imburse the old ones. 339

18. To a *mandamus* to swear a churchwarden *non fuit electus* is no good return. 380, 325

18. A *mandamus* to the chamberlain of *London*, to admit a joiner to the freedom of merchant taylors company in *London*; he returns a by-law, That whoever exercises the trade of a joiner, shall take his freedom freedom

The T A B L E.

freedom in that company, and held well. Page 267, 268

Marriage, &c. Vide Conspiracy 3. Q. Evidence.

1. Of legal marriages, &c. Vide Bastards and Bastardy.
2. Of marriage settlements, &c. Vide 249 to 252
3. Of power to make leases, &c. reserved on a marriage settlement. Ibid. Vide Powers.

Mariners.

Of mariners wages, on a libel for them, a special contract was suggested, but a prohibition to the admiralty denied. 379

Marshal of B. R. Vide Judgment 18. Page 350.

Marshalsea.

1. On an *infirmul computasset* brought there, a bare accounting together is sufficient to give a jurisdiction to that court. 77
2. On an indictment and acquittal in B. R. an action was brought in the *Marshalsea* for a malicious prosecution, but on giving in bail above, the proceedings were stayed. 307, 308

Militia.

Whether physicians are by their charter exempted from finding a horse to serve in the militia. 12

Mistomer. Vide Abatement.

Modus decimandi. Vide Tythes.

1. A bill to establish a *modus*, payable

on or about such a day, not good; for the day must be certain. Page 375, 376

Money. Vide Debt and Payment.

1. Where money, &c. shall be brought into court, &c.
2. In trover and actions for damages, no leave for the thing, &c. to be brought into court, *contra in detinue.* 176
3. In *replevin* no stay of proceedings on bringing in what is due for damages. 379
4. Motion to stay proceedings on a judgment, for that part of the money was paid, denied, unless the remainder (with costs, &c.) be brought into court. 236
5. On a disjunctive agreement to find lodging, diet, &c. or pay 10*l.* the 10*l.* was brought into court. 305
6. Where money is paid in part on a bond, though expressed as paid for principal, it shall be applied towards the interest due. 242
7. Where money is paid indefinitely, the creditor has election to apply it to what debt he will. 236

Multiplicity of Suits.

1. Where to avoid multiplicity of suits an action will not lie. 52, 352
2. Where there is a contest with a corporation, the matter shall be tried in an information, to avoid a multitude of suits. 114
3. For though a verdict and judgment should be against a single person, it would not end the contest as to the rest. *ibid.*
4. Also in a dispute between a parish and the county who shall repair a bridge, the information shall go against the county; for though that parish is not obliged to repair, another

The TABLE.

other might, which may be shewn by the former parish. Page 120

Murder. Vide *Indictments*.

See two persons indicted of murder, and one of them acquitted, though they were both doing an unlawful act. 164, 165

Musician. See *By-Law*.

Mutual Covenants. See *Covenants*.

Nil debet. Vide *Pleas*.

Non compos.

WHAT proof shall be allowed, or not, to make one *non compos*. 59, 60

Non prof. & Nonsuit.

1. A plaintiff suing *in forma pauperis* is not to pay costs on a nonsuit. 344
2. The declaration was with four counts, defendant demurred to one of them, and plaintiff joined, and had judgment, and then enters a *non prof.* as to the other three, but without a *misericordia*, and in error held not necessary. 198

Notes promissory.

1. In an action on a promissory note against the drawer, the plaintiff need not allege notice to the defendant of the indorsement. 43
2. In an action on 3 & 4 *Ann. c. 9.* against the indorser of a promissory note, *fecit notam* implies he signed it. 307
3. The indorsee sued the drawer upon a note, by which he promised to account with T. S. or his order, for

50 l. value received; and held good upon the said statute. Page 362

4. Debt will not lie on a promissory note; but an *indeb. assump.* will. 373
5. See the construction of the several statutes of promissory notes, and inland bills. *ibid.*

Notice, &c.

1. Notice must be given to the drawer of a promissory note not being paid by the indorsee. 43
2. Notice must be given on a *scire fieri* inquiry, of its being issued, &c. 366
3. A writ of error sued and allowed before execution served is good, though the defendant has no notice of it. 373

Oaths. Vide *Affidavits*.

1. **WHERE** a negative oath shall be preferred to an affirmative. 81
2. Of taking the oaths, &c. by virtue of the *stat. 1 Geo. I. c. 1.* 45

Obligations. Vide *Bonds*.

Offices and Officers. Vide *Quo Warranto*.

1. See divers cases of removal from offices in corporations before conviction. 101, 102
2. None (in corporations, &c.) who has been in office one year, shall be chosen into it the next. 133

Orders of Justices. Vide *Justices and Sessions*.

Ordinary. Vide *King's Prerogative* 5 and 6.

Of

The TABLE.

Originals. Vide **Philazers.**

Overseers. Vide **Poor.**

Outlawry.

1. See an outlawry for high treason reversed for error. Page 26

2. One outlawed for a seditious libel bailed on bringing a writ of error. 177

Papists. Vide **Recusants.**

Pardons. Vide **King, &c.**

Parishes. Vide **Bastards and Parish Settlements.**

THE stat. for relief of the poor, extends to extraparochial places. 39

Parish Settlements. Vide **Bastards, Sessions, &c.**

1. Payment of taxes, though not charged personally or nominally, but only as occupier of the tenement, makes a settlement. 38

2. A servant living with a visitor gains a settlement. 50, 51.

3. An apprentice having served two years in one parish, was turned over to a master in another parish where he served out his time; he shall be settled in the last parish. 168, 169

4. Being bound an apprentice and serving will not make a settlement without inhabiting. 285

5. A servant is to be settled where he serves, and not where is hired. 60, 61. Vide 50, 51

6. Lawful children are to be settled where the parents were settled 169, but bastards where born. 170

7. A servant may be settled where the master had no settlement. Page 50, 51, 170

8. An apprentice hired as a servant after his master broke, makes no settlement, unless the indenture be discharged, &c. 235

9. Where the husband may gain a settlement by marriage with his wife. 287

10. The settlement of a poor man is where he dwells, and not where he works. 308

11. Yet his settlement is where he serves, and has board-wages, and not where he lodges, &c. 369

12. See an indictment for a conspiracy in giving a man money to marry an old disabled woman, in order to charge the parish. 320

13. Note, forty days service under an indenture, gains a settlement. 235
Vide 50, 51, and 61

14. See an information against the overseers and justices, for removing a sick person. 326

15. See orders of removal quashed, because the county was only in the margin, or of what age the children were. 309, 337

16. No complaint to the justices, unless made by the churchwardens and overseers, can justify an order of removal. 64

17. Birth gains a settlement in no case (except bastardy) but where the settlement of the father or mother is unknown; and then it gains it only till the legal settlement is known. 170

18. Though a wife has a legal settlement before marriage, yet it is lost by the marriage. 170

19. And on the husband's death, she and her children are to be placed where he was last settled. 170

The T A B L E.

20. Hiring a servant in an extraparo-
chial place is a good cause within
the statute to make a settlement in
that town or parish where the ma-
ster lives. *Page 50, 51*
21. The master has lands in two pa-
rishes, lives in one, but keeps ser-
vants in the other; they are settled
in the parish where they serve, and
not where the master lives. *61*
22. An order for removing poor chil-
dren quashed, not saying of what
ages they were. *337*
23. An order confirmed on appeal
makes a good settlement in the
parish appealing against all others.
200, 201
24. And the order of sessions is pe-
remptory, unless a cause for rever-
sing it appear therein. *61*
25. If the order of the justices, or
that of the sessions, be affirmed in
B. R. it concludes only the con-
tending parishes. *50*
26. An attachment will go against
parish officers for a contrivance to
settle a poor man and his family.
200
27. And see indictments for conspira-
cies to settle poor persons fraudu-
lently, &c. *320, 321, &c.*

Parliament Privilege.

How to proceed against persons having
privilege of parliament. *228. Vide*
20, 21

Paupers.

A pauper shall not pay costs on a
nonsuit, though an estate fall to
him afterwards. *344*

Payment. See Money.

1. Where a sum of money is agreed

to be paid at several times, an ac-
tion lies for the whole on a failure
at any one time. *Page 56, 57*

2. Money was paid on a bond as
principal, yet taken to be in dis-
charge of interest. *242*
3. Debt on a bond of 35 years stand-
ing, on *solvit ad diem* pleaded,
payment shall be presumed. *278*
4. *Q.* If an indorsement of interest
paid be evidence of such payment.
279, 280
5. Where payment before the day, is
payment at the day. *345*
6. See an ejectment for non-payment
of rent, and judgment thereon;
but the execution stayed. *ibid.*

Peers.

Motion for a peer to wave his privi-
lege, &c. *Vide 20, 21*

Perjury. *Vide Affidavits 2. and*
page 179.

Philazers.

After two terms they will not
make out an original without ap-
plication to the court of Chancery.
285

Physicians.

1. See the exposition of their charters,
&c. *12 to 19*
2. Whether the physicians are ex-
cused from finding a horse to serve
in the militia. *12*

Piracy. *Vide Indictments 8, 9.*
and page 76.

Pleas.

The T A B L E.

Pleas, &c. Vide Abatement, Estoppel, Issues and Mandamus.

1. Where a plea need not conclude *prout patet per recordum*. Page 30
2. See recusancy pleaded in disability of the plaintiff. 43, 44, 45
3. Tender, how to be pleaded, and when to be made. 69, 70, 71, 218, 219, 292
4. Where *nil debet* may be a good plea, and where it cannot. 106, 323
5. The statute of limitations pleaded 109. to an assignee of commission of bankruptcy. 171
6. Where the defendant may plead the general issue, and give the special matter in evidence. 120
7. *Non assumpsit* is a good plea to an action brought against a common carrier. 178
8. Where the plea is in the affirmative, the proof lies on the defendant. 180
9. Plea of assents *die impetrationis brevis original* when the proceedings were by bill, is ill. 288
10. Where a defendant ought to plead in chief, &c. 289
11. Customs, &c. how to be pleaded. 296, 297, 298, 300
12. *Nil debet* is no good plea to an action of debt on a penalty (or specialty). 323, 382
13. A plea not answering the declaration is ill, &c. 330
14. So where the rejoinder did not answer the replication, the plaintiff had judgment. 343
15. Of pleading, &c. to a bond for money won at play. Vide 57
16. In a *quare impedit*. plenarty is no good plea to bind the King's right. 8
17. In dower *uncore prist* is a good plea, where an actual assignment is made. 25

VOL. VIII.

18. Collateral matter pleaded to a declaration where the demand is ill set forth, may make it good. Page 356. Vide 70, 71
19. Where the condition is in the disjunctive, the defendant may plead performance of either part, and if one part be falsified in pleading, the plaintiff must have judgment. 349
20. Where a time and place of doing is made certain by the agreement, he who pleads a tender must also plead a refusal by the other; and if he be not present, that must be shewn. 106
21. Plea in bar that he gave a note of 20 l. in full satisfaction of the debt, and on demurrer held ill; for a note so given is no discharge of a debt or duty. 290
22. After Not guilty pleaded, the defendant cannot justify or plead specially. 305
23. Where *nil debet* is a good plea or not. Vide 106, 323, 381
24. Trespass for entering his land, taking his hops, and destroying his poles; defendant justifies that the ground was his own, and that he took the poles *damage feasant*; and on demurrer adjudged for the plaintiff; for the defendant cannot justify destroying a thing distrained. 330
25. Where the justification is good, the traverse is immaterial. 31
26. Where payment before the day may be pleaded as paid at the day. 345, 346
27. An executor denied time to plead, unless he would enter into a rule not to plead any judgments, &c. 308
28. After *in nullo errat* pleaded, it is never allowed to amend general errors. 304
29. *Sunday* is not reckoned one of the four days time to plead. 21
30. The

The TABLE.

30. The principal and bail cannot join in a plea. Page 289

31. Double pleas denied. 182

Policy of Insurance.

8 See an action on a policy of insurance for a ship lost by barratry or fraud of the master. 230

Poors Rates, &c.

1. A *mandamus* to a justice of peace to distrain for a poors tax (*i. e.* for a quarter). 10

2. The poors tax ought not to be made for a year, but only from quarter to quarter. *ibid.*

3. The statute for relief of the poor extends to extraparochial places. 39

4. The lessee of tithes, and not the rector, is chargeable to the poors tax. 61, 62

5. Covenant to pay taxes on the lands, rates to church and poor are not taxes on the lands. 314

6. See *mandamus*'s to justices to sign poors rates. 335, 344

7. A *mandamus* will not lie to the new overseers to make a rate to reimburse the old ones. 339

8. An overseer is not bound to lay out money till it is raised; but if he does, he may make a new rate, and reimburse himself out of it. 339

Poors Settlements. Vide Parish Settlements.

Powers. Vide Leases.

A power was by marriage settlement for tenant for life, to lease all, or any part of the lands at such rents, or more, as then let at. He leases the mansion-house, (which was never let), reserving no rent, and

adjudged a void lease, for his power was only to let lands then demised, and on which some rent was reserved. Page 249, 381

Prerogative. Vide King.

Principal and Interest. See Money.

Prisoners. Vide Escape and Execution.

1. In treason, &c. their irons to be struck off before they plead to the indictment, &c. 82, 91

2. A rule for their friends and relations to come to visit them. 86

Privilege. Vide Parliament and Peers.

Prochein Amie. Vide Infant.

Profaneness, &c. Vide Contumacious 8. and Informations 4.

Prohibition and Consultation.

1. In error on a libel for a prohibition in a suit for tithes, variance assigned between the libel and the plea. 1, 2

2. The awarding consultation not only sets aside the prohibition, but gives the plaintiff in the spiritual court leave to proceed there on his libel. 3

3. The alledging in the declaration, that the plaintiff in the spiritual court had proceeded there *contra formam prohibitionis*, is but a supposed contempt, and suggested only as a ground for a prohibition. 3

4. And the finding or not finding of such contempt is altogether immaterial. *ibid.*

5. And if the plaintiff here will have any advantage of the defendant's pro-

The TABLE.

proceeding there after a prohibition, this being matter of evidence should be proved at the trial, and damages then insisted on for so doing. Page 3

6. A prohibition to the spiritual court, the defendant having given a bond to deliver a will which he had got out of that court. 327

7. On motion for a prohibition, the court will not take judicial notice of a custom in *London* after sentence. 176

8. No prohibition to the Admiralty court after sentence, but for cause apparent on the record. 194

9. A prohibition to the spiritual court on a suit there for seats in a church. 338

10. On a prohibition it is queried who is the visitor of *university college* in *Oxon*. 367

11. On a libel in the admiralty for mariners wages, a special contract was suggested, but a prohibition was denied. 379

12. See a prohibition to the grand sessions in *Wales*, for that the defendant living in *London*, was served with process out of that court, and not appearing thereon, his lands were sequestered. 374

13. A prohibition to the spiritual court, for words spoken in *London*. 114, 115

14. Prohibition denied. 338

Promissory Notes. Vide **Notes.**

Proof. Vide **Evidence** and **Witnesses.**

Protections.

One committed to the *Fleet* for selling written protections. 340, 341

Purchase, &c. Vide **Devises** and **Descent.**

Quare Impedit.

Plenarty is no good plea therein, to bar the King's right. Page 8

Quo Warranto's. V. **Turrroughs** 3.

1. A *quo warranto* information for usurping the office of mayor of *Lestwithyel*. 132

2. Another against the steward of a leet for impanelling a jury not duly summoned. 135

3. A rule against divers claiming to be capital burgeses, and another to be recorder of *Brecknock*. 165, 166

4. See a rule, &c. against the mayor and common council of *Bedford*. 34, 35, 36

5. On that information it was queried if the verdict could be set aside for misbehaviour of a jurymen, and all the Judges of *England* divided, 201, 2, 3, &c.

6. See two rules against two persons claiming to be mayors, and others to be capital burgeses of *Penryn*. 215, 216

7. An information against *Pindar* for usurping the office of mayor of *Penryn*. 234

8. The defendant (*Cracker*) found guilty of usurping the office of mayor of *Tregony* several years, &c. fined 200*l*. 285, 6

Recognizance. Vide **Bail**, and **Scire Fac.**

Records.

1. **S**EE a rule denied to make up a record with an arrest of judgment

The TABLE.

ment in order to support a bill in Chancery against the prosecutor.

Page 45

2. See an attachment against an affo-
ciate for amending a record after
motion in arrest for the same error.

226

Recusants.

Of pleading recusancy in disability,
and of recusants taking the oaths.

43, 44, 45, 381

Register.

What is a good registering of a *South-
Sea* contract within *stat. 7 Geo. 1.*

sess. 2. c. 1.

173, 174

Remainders contingent, &c.

1. Of cross remainders. *Vide* 254
2. Where devisees shall take an estate
for life, with contingent remain-
ders, &c. 253
3. An executory devise to two on the
contingency of a third person's
dying in the life of those two (with-
out issue). 346, 347
4. See and note the resolution of the
court in the case of contingent re-
mainders on a devise. 382, 383, &c.

Rents. *Vide* Ejectment 6.

Replication and Resolinder. *Vide*

Plea 14.

Replevins.

1. See goods replevied, though di-
strained on a conviction of keeping
dogs, nets, &c. not qualified, 208,
209
2. In replevin no stay of proceedings
on bringing in what is due for da-
mages. 379

3. A *sci. fa.* against the pledges in
replevin, is in nature of a declara-
tion, and amendable. *Page* 313,

314

Rescous. *Vide* Indisements.

1. In rescous, &c. an attachment is
not to be granted till return of the
writ. 110, 342
2. An attachment against divers, for
rescuing one taken on an escape
warrant. 241
3. In an indictment for a rescue, the
whole proceedings, *viz.* the *fi. fa.*
&c. are to be set forth at large. 357

Residuary Legatee. *Vide* Devise.

Returns. *Vide* Rescous 1. and Sheriffs.

1. Return to a *mandamus* setting forth
articles for a removal *ad effectum*
sequen' is ill. 102
2. The return to a *mandamus* may be
demurred to, or traversed by 9 *Ann.*
c. 20. 113
3. The return to the *mandamus* for
restoring Dr. Bentley to his degrees,
&c. 151
4. Eight days to be between the teste
and return of each *sci. fa.* against
bail. *Vide* 31
5. A *capias* against the principal, and
sci. fa. against bail, held irregular,
because only four days between the
teste and return. *ibid.*
6. The return of a *sci. fa.* against
bail must be on a day certain, if the
proceedings against the principal be
by bill, for it is an original suit,
&c. 188
7. The plaintiff died before the re-
turn of the writ, proceedings against
the bail set aside. 240

Rights.

The TABLE.

Rights. Vide King 4.

1. Where two rights meet, the best is to be preferred. Page 23
2. A copyholder, before admission, has neither *jus in re*, nor *jus ad rem*, (*i. e.* neither a right of possession, nor a right of propriety). 352
3. Of rights and remedies. 353

Scire Facias. Vide Bail 2, 7, 12, 13, 16, &c. and *Capias* 4.

1. **A** *Sci. fa.* will not lie for costs without shewing that the judgment was affirmed in *Cam. Scac.* 73
2. A *sci. fa.* for costs must always go into that county where execution on the original judgment should be made; but debt on such judgment, or on a recognizance, may be laid in any county. *ibid.*
3. A *sci. fa.* against the bail of John when his name was Thomas. 113
4. An execution sued out before the testator's death, may be executed after without a *sci. fa.* 225
5. A *sci. fa.* against the pledges in replevin is in nature of a declaration, and amendable. 313, 314
6. A *sci. fa.* may be against the bail jointly, and yet a several execution against each of them. 199
7. The principal and bail cannot join in a plea to the *sci. fa.* 289, 290
8. Tenant for life, remainder to his issue in tail, acknowledged a statute and died, a *sci. fa.* issued on the statute against the issue in tail, and returned *scire feci*, if the issue does not come in at the day, he may be charged with the execution, and can no way avoid or set it aside. 113
9. Proceedings against the bail stayed, because only four days between the

Vol. VIII.

teste and return of the *sci. fa.* brought by the executor against the principal. Page 305

10. There must be fifteen days inclusive between the teste of the first and return of the second *sci. fa.* against bail; and the first must be duly returned before the second is sued out (and it ought to be four days in the office). 227, 228
11. Moved to set aside proceedings on a *sci. fa.* in which were many rasures and interlineations, but denied. 243
12. But if any material alteration be made therein by the clerk, &c. after it is sealed, this is a misdemeanor, and punishable. 243
13. A *sci. fa.* directed to the sheriff of *Middlesex*, will not lie on a recognizance taken at a judge's chamber in *London*; but if it be enrolled at *Westminster*, the party has election. 290
14. Notice must be given upon a *scire fieri inquiry*. 366

Scire Fieri Inquiry.

Notice must be given of executing a *scire fieri inquiry*. 366

Servants. Vide Apprentices, and Parish Settlements, and Justices.

Sessions Orders, &c. Vide Alehouses, Apprentices, Bastards, Justices, Parish Settlements, &c.

1. The sessions have no jurisdiction to indict for forgery (by the common law). 321
2. They have no jurisdiction in perjury by the common law, but have by statute. *ibid.*
3. They have jurisdiction *de conspirationibus*. *ibid.*

5 K

4. A

The T A B L E.

- | | |
|---|---|
| <p>4. A sessions order against selling ale, &c. quashed, because the county was only in the margin, and not in the body of the order. Page 309</p> <p>5. The <i>stat.</i> 5 & 6 E. 6. c. 25. has not given the sessions (nor two justices) power to put down ale-houses at discretion. <i>ibid.</i></p> <p>6. An order for removing poor children quashed, &c. because their ages were not shewn. 337</p> | <p>4. So an action lies for representing a tavern to be a bawdy-house. Page 215</p> <p>5. So he has the Pretender's picture in his room, and I saw him drink his health, &c. 283</p> <p>6. But not for saying I never came home and pox'd my wife, because merely negative. 290</p> |
|---|---|

Smuglers.

- A notorious smugler discharged on a *habeas corpus*, because not tried within two terms after the indictment found. 4, 5

South-Sea Stock, &c.

- | | |
|---|--|
| <p>1. If process be directed to the sheriffs of London, and one of them dies, the process is gone, for both make but one sheriff. 304</p> <p>2. See a sheriff ordered to return his writ (<i>aliter</i> an attachment, notwithstanding an injunction). 315</p> <p>3. An attachment cannot issue for a rescue till the sheriff has returned his writ. 110, 342</p> <p>4. Where the sheriff is indifferent, a writ is never directed to the coroners. 193</p> <p>5. The high sheriff returns the jury though his under-sheriff was both attorney and bail for the defendant. 247</p> <p>6. If any lawful objection be (by affidavit) made to the sheriff, a special jury may be struck by the master, otherwise the court will not slip the sheriff without consent of parties. 248</p> | <p>1. <i>A.</i> having purchased stock for 750 <i>l.</i> entrusts <i>B.</i> her broker with the orders and minutes, <i>B.</i> gets another to personate <i>A.</i> and sells the stock to <i>C.</i> for 994 <i>l.</i> and having transferred it leaves the kingdom. <i>A.</i> hearing of the fraud, forbids <i>C.</i> to part with the stock, but <i>C.</i> notwithstanding sells it to <i>D.</i> for 1090 <i>l.</i> and <i>D.</i> sells it to <i>E.</i> for 1100 <i>l.</i> <i>A.</i> brings trover against <i>C.</i> and recovers 750 <i>l.</i> damages 9</p> <p>2. Stock must be transferred, or tendered to be transferred, before the other party is obliged to part with his money. 42</p> <p>3. Tenders, transfers of stock, &c. when and how to be made, and how to be pleaded, &c. 69, 70, 71, 218, 292, 381, &c.</p> <p>4. See a judgment against a South-Sea director set aside. 291</p> <p>5. See further of South-Sea contracts, &c. 173, 218, 232, &c.</p> |
|---|--|

Slander.

1. For saying *G. B. is the man who killed my husband*, action lies. 24
2. So *M. stole a sheep of his*, innuendo the defendant's, and it is not the first he stole by a hundred. 30
3. So he is a rascal, villain, liar, &c. spoken of a justice of peace, are actionable. 270

Stamp-Duties, &c.

1. On a conviction of forging the stamps, a rule denied for making up

The T A B L E.

- up the record with an arrest of judgment. Page 45
2. Motion to set aside two verdicts, because the *disfringas's* were not stamped, &c. but denied because they were stamped before the *posse* was brought in. 226
3. See an exposition of the act 5 & 6 W. 3. c. 21. that writings are not to be evidence till stamped. 365

Statutes.

General rules for expounding statutes.

1. Statutes are to be expounded by (the rules and reasons of) the common law. 8
2. The King cannot be divested of any of his prerogatives by the general words of a statute. *Vide* 6, 8
3. Though the words of an act are general, yet to avoid an apparent injury, they shall be specially construed. 7
4. And the general words of a statute may be qualified or restrained by subsequent clauses or sentences. 8
5. The *habeas corpus* act being suspended, the court declared they had no discretionary power to bail, &c. 96, 97
6. Where a statute directs a conviction to be on oath, a confession of the offence is sufficient. 63, 179

Particular Statutes explained.

- Stat. *Merton*, cap. 1. Of dower. 25
- Stat. *Gloucester*, c. 1. Damages. 25, 315
- Stat. 34 E. 1. c. 1. *De terris mensurandis*. 276, 7
- Stat. 15 R. 2. c. 2. Forcible entry. 65
- Stat. 1 H. 5. c. 5. Addition. 52
- Stat. 3 H. 7. c. 10. Costs, &c. 314
- Stat. 23 H. 8. c. 15. Paupers. 344
- Stat. 25 H. 8. c. 21. Faculty. 364

- Stat. 26 H. 8. c. 6. *Wales*. Page 136
- Stat. 28 H. 8. c. 15. Piracy. 74
- Stat. 34 & 35 H. 8. c. 26. *Wales*. 136
- Stat. 5 & 6 E. 6. c. 25. Alehouses. 309
- Stat. 5 Eliz. c. 9. Perjury. 179
- Stat. 18 Eliz. c. 3. Bastardy. 4
- Stat. 43 Eliz. c. 2. Poor. 39, 344, 345
- Stat. 3 Jac. 1. c. 8. Bail in error. 79, 237
- Stat. 21 Jac. 1. c. 19. Bankrupts. 49
- Stat. 16 & 17 Car. 2. c. 8. Jeofailes. 198, 356
- Stat. 22 & 23 Car. 2. c. 9. Of full costs. 371
- Stat. 6 & 7 W. 3. c. 11. Profane Curfing, &c. 58, 366
- Stat. 8 & 9 W. 3. c. 11. Vexatious suits. 115
- c. 17. Escapes by marshal. 350
- Stat. 9 & 10 W. 3. c. 17. Bills of exchange. 373
- c. 25. Stamp-duties. 365
- Stat. 10 & 11 W. 3. c. 23. Felony. 165
- Stat. 3 & 4 Ann. c. 9. Promissory notes. 362, 373
- Stat. 4 Ann. c. 16. Amendment of the law. 356
- Stat. 4 & 5 A. c. 16. Amendment of the law. 77, 198, 285, 303
- Stat. 5 A. c. 14. Preserving the game. 63
- c. 31. Felony. 264
- Stat. 6 Ann. c. 16. Brokers. 103
- Stat. 8 Ann. c. 9. Duty on candles. 319, 320
- Stat. 9 Ann. c. 14. Against gaming. 57, 187
- c. 20. *Quo Warranto*, &c. 28, 113, 128, 133, 203, 351, &c.
- Stat. 1 Geo. 1. c. 13. Popish recusants. 44, 45
- c. 48. For preserving trees. 175
- Stat. 3 Geo. 1. c. 15. Sheriffs. 187
- Stat. 5 G. 1. c. 24. } Bankrupts. 348
- Stat. 6 G. 1. c. 22. }
- Stat.

The T A B L E.

Stat. 7 G. 1. c. 13. Combination of
taylors. Page 10, 11

— c. 1. 5. South-Sea directors. 291

— c. 29. Pardon. 103

Stat. 7 G. 1. sess. 2. c. 1. Registering
contracts. 173, 232

Stat. 8 G. 1. c. 19. Preserving the
game. 238

Stat. 9 G. 1. c. 1. Suspending *habeas*
corpus. 96

See also Stamp-Duties.

Summons. See Alehouses and
Justices.

1. Where a summons must be set
forth in the order of justices, &c.
See 3, 4, 309, &c.
2. If the defendant be not summoned
it is a misbehaviour in the justices,
for which an information lies. 378
3. An order of bastardy quashed for
not setting forth that the putative
father was summoned. 4
4. Order good, though no summons
set forth in it. 377

Sunday.

Though *Sunday* is included in notices
for trials, &c. yet it is not included
in the four days rules to plead, &c.
(*Salk. 624. contra*). 21, 22

Surplusage.

1. An insensible word if surplusage,
shall not vitiate an indictment, &c.
327
2. And where the error is in a word
of surplusage, it shall not vitiate a
judgment. 377

Taxes.

RATES to church and poor are
not to be esteemed taxes on lands.
Page 314

Tender. Vide Pleas, South-Sea
Stock 2 and 3.

1. Tender, how to be made or plead-
ed. Vide 69, 70, 71, 218, 219,
292
2. Where a time and place is agreed
on by the parties, and they both
meet, he who pleads a tender must
also shew that the other refused,
&c. but if one of them is not there,
that must be set forth by the other,
and that he was there & *obtulit* 106.
Vide 70, 71, 219, 292

Trades.

Musick is no trade, but a science.
(Vide Debt) 211

Traverse. See Pleas.

The prosecutor may plead (demur)
to, or traverse the facts in the re-
turn of a *mandamus*. 28

Treason. Vide Indisements and
Outlawry.

1. One attainted thereof, and execu-
ted in *Middlesex*, though the facts
laid in *Essex*. 94
2. An intention to levy war is an
overt act to kill the King. 92
Vide *Of Challenges*, &c. 86

Trespass.

1. See an action of trespass laid with a
conversion. 217, 218
2. Where

The T A B L E.

2. Where the original act was a wrong in itself, there trespass *vi & armis* lies. Page 275

3. But where an injury is in consequence of a lawful act, it must be trespass on the case. 272

4. In trespass *quare clausum fregit*, and all local actions, the plaintiff cannot prove a trespass any where but where it is laid in the declaration, nor lay it any where but where done. 322

5. Trespass for entring the house of *A.* and taking the goods of *B.* *ad damnum ipsorum*; after a verdict and entire damages, the judgment was arrested. 370. *Vide* 165

6. Trespass on the case for destroying the plaintiff's common in six acres, a justification in three acres only, is ill. 120, 121

7. Trespass against two, for taking cattle and converting them; one suffers judgment by default, the other justifies by distress for rent due to him who suffered judgment; and to the conversion pleaded the plaintiff's licence to sell; which is found for him: the plaintiff now cannot have any benefit of the judgment, for it does not appear he had any cause of action. 218

Trover, &c. *Vide* Trespass.

1. In trover and actions for damages no leave to bring the thing taken into court. 176

2. An action of trover lies here for a conversion in *Ireland*. 322

3. For the plaintiff may lay the conversion here, and prove it was done in *Ireland*; but this is otherwise in local actions. 322

4. In trover the conversion is the point in issue, for which a certain time and place must be alledged. 177

VOL. VIII.

5. See trover for *South-Sea* Stock transferred to the defendant by one who personated the plaintiff. *Page* 9

6. In trover for a horse, if the inn-keeper seize for several nights, it is evidence of conversion. 172, 173

7. Though he may detain a horse for one night's meat, yet he cannot sell it and pay himself; if he does it is a conversion. 173

8. In trover for a ring, moved to bring it into court, denied; but leave was to amend the declaration. 176, 177

Trial. *Vide* Sunday.

1. A new trial is never granted in another term after signing the judgment. 264, 265

2. Motion for a new trial, because the jury found a general verdict by the judge's direction, and that he refused to sign a bill of exceptions, but denied, because not made before the judgment signed; *aliter* would have granted it. 220

3. On an indictment for smuggling, &c. the trial is to be within two terms after commitment. 5

4. On affidavit of the indisposition of a witness, the estreating a recognizance to try an indictment was stayed on paying costs, and entring into a new rule. 288

Cythes. V. Prohibition 1. Leases 3. Poor's Rates 4.

A modus payable on or about such a day is not good, for the day must be certain, &c. 375, 376

Variance.

1. **I**N error here from the King's Bench in *Ireland*, on a libel for
5 L a

The T A B L E.

- a prohibition in a suit for tithes, variance was pleaded between the libel and the plea, but over-ruled. (Vide Plea) Page 1, 2, &c.
2. Variance between the original and declaration, alledged it was right, only the N^o Roll mistaken, and therefore judgment affirmed. 243
- Venire.**
- On leave to amend a *venire* after error brought, the plaintiff in the original action is not to pay costs. 234
- Venue.** Vide Barrister.
1. In a transitory action by special original, the *venue* was changed. 229.
2. A barrister or attorney joined with another, has no privilege to change the *venue*. 316
- Verdict.** Vide Trial.
1. See a special verdict amended on paying costs. 48, 49
2. If a verdict on a *quo warranto* information could be set aside for misbehaviour of a jurymen, (and note all the Judges of England were divided on the point). 201, 202 to 208
3. A verdict given on good evidence, and so certified by the judge, ought not to be set aside. 134, 135
4. Where the defendant is acquitted in any case on a criminal prosecution, it shall not be set aside. 208
5. Motion to set aside a verdict because the agreement was in the copulative, and the breach was assigned in the disjunctive. 239
6. Where several issues are joined, a verdict finding one, and not the other, is ill, (*pro toto*). 3
7. A verdict amended by the notes of the clerk, and proof of the matter given in evidence, on paying costs. Page 49
8. Motion to set aside two verdicts, because the *Disringas*'s were not stamped, but denied. (Vide Stamp-Duty. 226
9. Where words may be taken in a doubtful sense, they shall be taken in that which will support the verdict, &c. 240
10. Words that are false *Latin* are cured by a verdict. 380
11. Objections in ejectment after verdict over-ruled. 303
- Vestries.** Vide Case 1 and 2.
- Visitor.** Vide King's Prerogative 5.
1. In a prohibition, it was queried who was visitor of *University college* in *Oxon*. 367
2. Where the ordinary may visit a royal foundation. 183
- Union of Churches.** Vide King's Prerogative 6.
- University Degrees.** Vide *Ban-*
damus 7.
- Uses.** Vide Feoffments.
- Wager of Law.**
1. **I**N account against one as bailiff *ad merchandizandum*, wager of law does not lie. 303
2. But if account be against one as receiver, if the plaintiff does not shew by whose hands, it will lie. *ibid.*

Wales.

The T A B L E.

Wales.

1. Indictment of murder removed out of *Wales*, and tried in an *English* county. Page 136, &c.
2. Yet see a *certiorari* denied for removing indictments of murder out of *Wales*. 146
3. Prohibition to the grand sessions there, for sequestring lands there on a process served in *London*. 374

Warrant of Attorney. Vide Attornies.

Though by the late statute the plaintiff's attorney is to file his warrant the term he declares, yet if he does it before the defendant pleads, it is well. 77

Wills. Vide Devises and Legacies.

1. Words in wills are to be taken in that sense as is consistent with reason. 60
2. See the rules of construction of words in wills. 123, 4, 5
3. A will of gavelkind lands cancelled by the testator. 208
4. Prohibition to the spiritual court on a suit there upon a bond given to bring in a will, they had delivered to the obligor. 327
5. Though a testator does not dispose of his estate with that prudence another might, yet it is no proof of his being *non compos*. 59, 60

Witnesses. Vide Evidence.

1. Objection to a witness that was to get by the event of the cause, answered. 60
2. The estreating a recognizance stayed, for that the defendant could not get his witnesses (being sick) at the trial. 288

3. So a verdict on an indictment of perjury set aside on affidavits made that he could not get his witnesses ready. Page 289
4. The plaintiff moved to have witnesses (seamen going a long voyage) examined at a judge's chamber, but denied, because he might have brought on the trial when he pleased. 326
5. But if the defendant had desired a favour of the court, it would not be granted without he would admit the plaintiff to examine those witnesses. *ibid.*
6. One of the bail being a material witness for defendant, he moved that new bail might be put in, but denied. 321, 322

Words, &c. expounded. Vide Verdicts, &c. Wills 1, 2.

1. Doubtful words shall be taken in *mitiori sensu*. 153
2. Where words may be taken in a double sense, the court, after a verdict, will always construe them in that sense which may support the verdict. 240
3. *Ad effectum sequen.* in a return, is ill. 102
4. Where words are to be *reddendo singula singulis*. 111
5. Where the words *fecit notam* in a declaration or plea, implies he signed it. 307
6. Parties to an indenture are estopped to deny essentials, but not descriptive words. 311
7. Of insensible words in indictments and verdicts. Vide tit. Surplusage.
8. Motion to quash an indictment for a riot and assault on a constable by reason of an insensible word. 327
9. The words *quadrant libris* in a bail-bond held good for 40 *l.* 342
10. Dower

The T A B L E.

10. Dower of three tenements, not good for the incertainty of the word tenement. Page 355

Vide Acres, Ejectment.

11. Of the force and effect of *per quod servitium vel consortium amisit*. 372

Particular Words explained, viz.

Accountable.	363
<i>Ad seiscind.</i>	83
<i>Ad talem effectum.</i>	100
<i>Barratry quid.</i>	230, 231
Depositions.	153
<i>Fecit notam.</i>	307
<i>Plenius veritat.</i>	83
<i>Pro consideratione.</i>	42, 105
<i>Quadrant libris.</i>	342
<i>Stulte agit, &c.</i>	152
Tenement.	355

Writings. V. Attorney and Deeds.

Writs.

1. Of writs of error. Vide Error, Ireland and Returns.

2. A writ altered after it is sealed, is a great misdemeanor; but no ground to quash the proceedings. Page 243

3. A sheriff ordered to return his writ, or be committed, though an injunction, &c. 315, 316

4. A *latitat* may be sued out before the cause of action. 343

5. After want of a bill filed in such a term (and so certified by the Chief Justice to the house of lords) a bill shall not be filed in that cause of any other term. 368

6. Where a *writ of inquiry* may be set aside or not. Vide 197 and 213

7. A judgment by default is not to be impeached where the defendant made defence on the writ of inquiry. 289

8. A writ of inquiry executed before all the money becomes due, is void. 349, 350

9. Notice must be given of issuing and executing a *scire fieri inquiry*. 366. Vide Inquiry.

See also tit. *Capias*, Error, *Fi. Fac.* *Scire Facias*, &c.

F I N I S.

Modern Reports, Vol. IX.

With preface

Modern Reports :

O R,

C A S E S

ARGUED and DECREED

IN THE

High Court of Chancery,

IN THE

Eighth, Ninth, Tenth and Eleventh Years
of KING GEORGE I.

To which are added

Some Special CASES on APPEALS.

VOLUME IX.

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TABLE

OF THE
NAMES OF THE CASES
IN THE

Supreme Court of the City of New York
IN THE

33	Cherry v. Vinton	100	Barber v. Young
33	Adams v. Clark	101	Barber v. Young
131	Allison's Case	102	Barber v. Young
97	Anderson v. Commonwealth	103	Barber v. Young
97	Anderson v. Commonwealth	104	Barber v. Young
12	Anderson v. Commonwealth	105	Barber v. Young
12	Anderson v. Commonwealth	106	Barber v. Young
12	Anderson v. Commonwealth	107	Barber v. Young
12	Anderson v. Commonwealth	108	Barber v. Young
12	Anderson v. Commonwealth	109	Barber v. Young
12	Anderson v. Commonwealth	110	Barber v. Young
12	Anderson v. Commonwealth	111	Barber v. Young
12	Anderson v. Commonwealth	112	Barber v. Young
12	Anderson v. Commonwealth	113	Barber v. Young
12	Anderson v. Commonwealth	114	Barber v. Young
12	Anderson v. Commonwealth	115	Barber v. Young
12	Anderson v. Commonwealth	116	Barber v. Young
12	Anderson v. Commonwealth	117	Barber v. Young
12	Anderson v. Commonwealth	118	Barber v. Young
12	Anderson v. Commonwealth	119	Barber v. Young
12	Anderson v. Commonwealth	120	Barber v. Young

A

T A B L E

O F T H E

N A M E S of the C A S E S

I N

C H A N C E R Y.

A.		C.	
A Cherley <i>versus</i> Vernon.	Page 68	Carpenter <i>v.</i> Chapman.	Page 92
Adams <i>v.</i> Clarke.	154	Carrick & al' <i>v.</i> Errington.	33
Alison's Case.	62	Charles & al' <i>v.</i> Andrews.	151
Anderson <i>v.</i> Commissioners of forfeited Estates.	54	Coningsby's (E.) Case.	95
Annesly <i>v.</i> Palmer.	7	Coventry (Countess Dowager) <i>v.</i> the Earl of Coventry.	12
Anonymus.	43	Coventry (Mayor and Burgefs) <i>v.</i> Lord Craven.	6
	66	Cox & al' <i>v.</i> Coffin & al'.	120
	92		
Ashton <i>v.</i> Bretland.	58		
Ayliffe <i>v.</i> Tracy.	3		
B.		D.	
Barker <i>v.</i> Giles and Smith.	157	Dawson <i>v.</i> Chater.	90
Bateman <i>v.</i> Roach.	104	Derwentwater's (Lord) Case.	172
Bertie <i>v.</i> Earl of Chesterfield.	31	Descarlett <i>v.</i> Dennett.	22
Boothly <i>v.</i> Vernon.	147	Devallar's Executors <i>v.</i> Herring.	44
Bow <i>v.</i> Smith.	94	Dowse <i>v.</i> Rue.	38
Ruggins <i>v.</i> Yates.	122	Drummond <i>v.</i> Decker.	100
Burdet <i>v.</i> Young.	93		
		E.	
		Evans <i>v.</i> Hoskins and the City of Gloucester.	83
			F.

The T A B L E.

F.		Osborn v. Lea.		Page 96
Floire v. Sidenham.	Page 99	R.		
Fryar v. Vernon.	124	Rashfield v. Careless.		9
G.		Reeves v. Reeves.		128
Groe v. Gore.	4	Reynolds v. Lady Tenham.		40
H.		Roper v. Radcliffe & Constable.		167, 181, &c.
Hack v. Leonard.	90	S.		
Halfpenny v. Udale.	56	Savage v. Forster.		35
Heron v. Newton.	11	Scurry & Ux' v. Morse.		89
Hill v. Filkin & Ux'.	154	Smart v. Taylor.		98
Hobson v. Staneer.	80	Smithson & al' v. Dobson.		117
Hosier v. Read.	86	Soley v. Salisbury.		153
Hungerford v. Clay.	1	Southwell v. Lord Limerick.		133
Hutchison & al' v. Vincent.	27	and		210
L.		Spencer v. Chase.		28
Lawly v. Lawly.	32	Steed v. Craigh.		42
Lucas v. Adams.	118	Strafford (Earl of) v. Lady Wentworth.		21
M.		T.		
Marlborough (Dutcheſs of) v. Sir John Vanbrugh.	23	Theobald v. Dufoy.		101
Mead v. Caswell.	60	Trevor v. Trevor.		161
Mitford & al' v. Lord Herbert & al'.	113	V.		
Morgan v. Dillon.	135 & 210	Vernon v. Benson.		47 & 209
N.		W.		
Neve & al' v. Keck.	106	Wafer v. Mocato.		112
Newland v. Sheppard.	57	Waller v. King.		63
O.		Webber v. Earl of Monrath.		143
Orby v. Trigg.	2	Whitechurch v. Whitechurch.		124
Ord v. Blacket.	116	Wing v. Wing & al'.		109
		Winter v. Bermingham.		146
		Wright v. Hobart.		64

D E

Term. Paschæ,

8 Georgii, 1722. In Cancellaria.

Hungerford *versus* Clay.

EDward Hungerford, the plaintiff, having mortgaged an house in *St. Clement's Lane* in *London*, to the defendant *Clay*, tendered the principal sum and the interest, to the said mortgagee, which he refusing to take, he (the plaintiff) exhibited his bill in this court to have a re-conveyance upon the payment of the said money.

The substance of the defendant's answer was, that he had made a lease of this house for five years, reserving so much yearly rent; and that after the expiration of the said term, he had *covenanted that the lessee should hold it for four years longer*, if he (the lessee) was willing so to do, that the said five years were now expired, and that the lessee was willing to hold the house four years longer; and that if the plaintiff would grant such lease, then the defendant would re-convey, upon the payment of the said principal sum and interest.

This cause was heard at the *Rolls*, where the defendant had a decree in his favour; but upon an appeal to this court it was insisted for the plaintiff, that as a mortgagee cannot present upon the avoidance of a church, so by the course of equity he cannot make a lease of an house or lands in mortgage, but where there is an absolute necessity so to do, which doth not appear in this case; for if the mortgagee should make such leases, they may be avoided by the mortgagor before the equity of redemption is foreclosed.

* Now, admitting the mortgagee should make a lease for four years longer, reserving rent, and such lease should be adjudged good between him and the lessee, it would be difficult for the mortgagor to recover any rent, tho' the principal and interest should be paid, because he doth not claim under the estate of the mortgagee, and therefore cannot have any benefit of the lease made by him; for he is neither party to the deed, nor privy to the estate, therefore the mortgagee ought to reconvey free from all incumbrances.

Econtra.

Those who argued for the defendant, admitted that a mortgagee cannot present upon an avoidance of a church; the reason is, because it doth not lessen his debt; but 'tis otherwise where he makes a lease of a house or lands in mortgage, rendring rent, for certainly the payment of rent will lessen the debt; so there is no parity of reason between those cases.

Curia.

But the *Lord Chancellor* was of opinion, that the mortgagee, before foreclosure of the equity of redemption, cannot make a lease for years of an house in mortgage to bind the mortgagor, unless to avoid an apparent loss, and merely in necessity; so the decree at the Rolls was reversed.

Orby *versus* Trigg.

Covenant,
that if the
estate was to
be sold, the
mortgagee
should have
the benefit of
pre-emption;
but not being
claimed before
the estate was
sold, he lost
the benefit of
that covenant.
2 Eq. Cas.
Abr. 599.
pl. 24.

THE brother of the now plaintiff mortgaged his lands to the defendant, and afterwards died, in which deed of mortgage there was a covenant to reconvey upon six months notice of the payment of the principal sum and interest; and another covenant, that in case the estate was to be sold, that the mortgagee should have the pre-emption.

After the death of the brother, who was the mortgagor, his widow delivered up the counterpart of the mortgage to the attorney of the mortgagee; and now the plaintiff having giving the defendant six months notice, that he would pay the principal and interest; and having it ready to pay, the defendant refused to accept it; whereupon the plaintiff exhibited his bill for a reconveyance of the estate having entered into articles, with a purchaser for the sale thereof.

The defendant by his answer insisted on the covenant in the deed to have the *pre-emption*; but it appearing, that neither the plaintiff or the purchaser knew any thing of this * covenant, for that the counterpart of the mortgage was delivered up as aforesaid; and that the plaintiff had often made application to the mortgagee for a copy thereof, which was as often denied, he insisting only to have the principal and interest paid, for that the security was too narrow for the money which he had lent; and that if it was not paid by such a time, he would foreclose the equity of redemption, but never mentioned that he was to have the benefit of *pre-emption* till after the estate was sold; therefore he ought not now to claim it to the prejudice of the purchaser, and of the plaintiff, having so long time for that purpose before the estate was sold; and it was decreed accordingly, and the mortgagee to reconvey upon payment of the principal and interest, &c.

* P. 3.

Term. Pasch. 8 Georgii, 1722. in Canc.

Ayliffe *versus* Tracy.

UPON a bill exhibited against the executors of *Sir Thomas Hasehwood*, the case appears to be thus: The father agreed to give his

daughter 3000 *l.* as a marriage-portion with the plaintiff, and having devised 2000 *l.* to her died before the marriage. Decreed that the husband shall not have the other 1000 *l.* because he knew that 2000 *l.* was devised to her, and having accepted that legacy in marriage, shall have no more. 2 Will. Rep. 65. pl. 9.

J. An agreement was made in the year 1720. between the plaintiff and the said *Sir Thomas*, that he the said plaintiff should marry the daughter of *Sir Thomas*, by which agreement the plaintiff was to settle so much lands in jointure, in consideration of the said marriage, and of 3000 *l.* to be paid to him as the marriage-portion.

The marriage took effect, and that four years before this agreement was made, (*viz.*) Anno 1716. *Sir Thomas Hasehwood* made his will, and thereby devised to his said daughter the sum of 2000 *l.* and no more; and before the said marriage was had, the said *Sir Thomas* died suddenly; and now the plaintiff exhibited this bill against his executors to have the other 1000 *l.* paid to him according to the said marriage-agreement.

The court was of opinion, that the plaintiff might have some *Caria* colourable pretence to this 1000 *l.* if before his marriage with the daughter he had not known, that her father had devised 2000 *l.* to her, and no more; but having married the daughter, and accepted that legacy, he shall recover no more.

* Besides, if this 1000 *l.* had been recoverable, it must be in right * P. 4. of the husband alone, for his wife hath no manner of right; therefore if he die before it is recovered, his executors or administrators, and not the wife, will be entitled to it, so that he ought rather to have exhibited his bill for the whole 3000 *l.* than for 1000 *l.* residue thereof, because the 2000 *l.* he received by virtue of the will, can be no part of the 3000 *l.* upon the marriage-agreement; so the bill was dismissed with costs.

D E

D E

Term. Sanct. Trin.

8 Georgii, 1722. In Cancellaria.

Gore *versus* Gore.

Devise to the
eldest son of
his eldest son
in tail male,
and for want
of such issue
to the use of
his second son
in tail male;
he shall take
immediately.

2 Wil. Rep.
28. pl. 8.
2 Kel. 254.
pl. 203.
2 Barnard.
K. B. 209,
229, 355.
2 Stra. 958.
10 Mod. 501.
See 8 Vin.
Abr. 370.
pl. 14.
* P. 5.

THIS case upon the pleadings was agreed on both sides to be as followeth, (*viz.*) The father being *seised in fee*, devised his lands to trustees, and their heirs, executors, &c. for the term of five hundred years upon such trusts as by his will should be declared, and from and after the expiration, or other sooner determination of the said term and estate, *then to the use of the eldest son* (of his the said testator's *eldest son*) and the heirs males of his body; and for default of such issue to the use of his (the said testator's) second son, and the heirs males of his body with several remainders over in tail.

The father died, and his eldest son having no issue, the second son claimed the estate as the issue in tail male; and upon the hearing this cause, the case was thus stated, and referred to the Judges of the King's Bench for their opinion, who should have this estate, either the second son of the * testator, or whether the *fee-simple* should remain in the trustees until his eldest son should have a son.

And upon hearing counsel on both sides, it was the opinion of the Judges that the second son of the testator should take immediately upon his (the testator's) death, and their reasons were, first, because the son of the eldest son (*not yet born*) could not take by way of *remainder*, because there was no particular estate to support it; neither could he take by way of *executory devise*, so that if the *fee-simple* should descend on the heir at law of the testator, and vest in him till this contingency of the birth of his eldest son should happen, it would tend to a *perpetuity*.

Now this case coming back to the court upon the judges certificate of their opinions, it was moved that it might be argued again, because being referred to them by way of case stated, no writ of error would lie upon their judgment.

Where a
reference
is to the
judges on a
case stated,
no writ of
error will lie

on their judgment; if they certify their reasons, the court may consider of it.

The

The court declared, that where a case is referred to the judges for Curia. their opinion, it shall conclude this court, 'tis true, 'tis not so when they come into court, and give their opinions here; but the judges having *certified their reasons* for their opinions, this court may consider thereof, like a general verdict at common law, which concludes the judgment of the court; but if the jury specify *their reasons* for such verdict, 'tis otherwise; so where the king grants a thing *ex mero motu*, without any express consideration, such grant is good; but where the consideration is expressed in the grant, and 'tis either wrong or false, it makes the whole grant void, if the consideration Hob. 222. is not executed, for this holds only where the consideration is executory.

Now if the parties should rest under this opinion of the judges, there would be an end of the cause, and as this is a point which ought not to be determined by the opinion of any one court, but to have a final determination in a proper method; therefore it was ordered, that counsel should speak to this point at the hearing this cause, so that it may come before the house of lords upon an appeal, if either of the parties should think fit; but they agreed.

See the case
Boothby v.
Vernon,
post. 148.

" Afterwards the testator's second son died without issue, where-
" upon D. a next remainder-man, bringing this matter yet once
" more into *Chancery* in Lord Chan. *Talbot's* time, his Lordship re-
" ferred this matter again to the judges of *B. R.* who certified that
" they thought the remainder good, and that an *interim estate*, till
" the birth of the son of the testator's eldest son (and who was since
" born), descended to the testator's eldest son, and so the contingent
" remainder supported, as Mr. *Viner* heard. 8 *Vin. Abr.* 370. in
" a note to *pl.* 14.

* The Mayor and Burgeffes of Coventry *versus* Lord * P. 6.
Craven, and others.

AN information had been formerly exhibited against the Mayor; &c. for misapplying a charity; and upon a bill likewise brought against him in this court, it was made appear, that the magistrates of *Coventry* had taken 4000 *l.* of this charity to their own use; and thereupon it was decreed, that they should repay that money by such a time, or that the Lands thus given for this charity should be conveyed to other persons for the purposes aforesaid.

After a decree signed, enrolled and exemplified, the plaintiff had relief upon an original bill concerning the same matter.

But the magistrates not complying with this decree in paying the money, and not being able to advance the said sum of 4000 *l.* the said *decretal order* was signed, enrolled, and exemplified under the great seal; and by virtue thereof the said lands were conveyed to the Lord Craven, and to twenty-nine other persons, and to their heirs, in trust, and for the benefit of the poor of that place.

And now the plaintiffs exhibited an original bill against the said trustees to have a reconveyance of these Lands, upon payment of the said 4000 l. for that the donor having appointed *the mayor for the time being, &c.* to be trustees and overseers of these poor people, the lands ought not to be taken from them, but upon some great misdemeanor of their own; and that the reason for which they had been taken away being now of no force, for that the money was ready to be paid in full satisfaction for the faults of their predecessors; and that such reconveyance ought to be made the rather, because most of the members of the corporation in whose Time this money was misapplied, were now dead, so that there could be no room for contesting their right to those lands; and for that, the *Mayor, &c.* being a body politick, the now members of that body ought not to be damnified by the faults of their predecessors.

'Tis true, the former decree made against the now plaintiffs the *Mayor, &c.* is signed and enrolled, and exemplified under the great seal; but yet the plaintiffs may have relief upon an original bill against such a decree; as for instance; the † wife, after separation from her husband, had a decree in this court for *alimony*, which decree was affirmed upon a *bill of review*, and likewise upon an *appeal in the house of peers*; but the husband being willing to be reconciled to his wife, exhibited an original bill to set aside * the said decree; and tho' it was confirmed with so much solemnity, yet the *Lord Keeper Finch*, being assisted by the judges, did agree, that it was a proper bill, and the husband was relieved.

Therefore it was insisted for the plaintiffs, that they being willing to perform every thing in the former decree, the lands ought not to be taken from them, but that they ought to have a reconveyance; besides, an original bill is proper where a decree hath been already obtained; for it may appear that such decree was obtained upon some precedent fraud or surprise; and after a decree to foreclose the equity of redemption, a longer time hath been allowed to pay the principal and interest.

'Tis true, in this case, the conveyance is absolute to the defendants and their heirs; but 'tis still a conveyance under the decree of this court, which is conditional, and like a conditional surrender and an absolute admittance, which must be made conditional, according to the surrender out of which it arises.

It was insisted for the defendants, that this is a very improper bill, and not within the rules of this court, as it appears by a printed copy of those rules now produced; for amongst the rest it appears, that no decree shall be varied or altered, after 'tis exemplified under the great seal, unless for error in law or fact, appearing in the very body of such decree, or by matter arising since the decree, or upon some evidence which could not be had at the time the decree was made.

'Tis

† Whore-
wood *versus*
Whorewood.
1 Ch. Rep.
250.
Ch. Cases
153.
* P. 7.

Econtra.

'Tis true, the Plaintiffs offer now to pay the 4000^l. which they have raised out of other Lands given to them in Trust likewise for a Charity, and for which there is an Information already filed against them; so that if a Reconveyance of the Lands now in Question should be decreed for them, and the Plaintiff in the Information should prevail, they might raise money out of the Lands thus reconveyed, to satisfy the other Charge against them.

The Court made no Decree, but would consider the Case of *Whorewood*, which is truly cited as above.

Annesly versus Palmer.

THE case was thus, (*viz.*) the testator made one will in the year 1708, and about four years afterwards, (*viz.*) in the year 1712, he made another will; and * by the first he devised all his real estate to charitable uses, and all his personal estate to particular legatees therein mentioned; and by his other and last will he devised his personal estate to other persons, and all his real estate to such uses as he should afterwards declare concerning the same, but died before he made any declaration of such uses.

Making a second will is a revocation of the first: after the probate of the first was confirmed by the delegates, a commission of review was granted.

* P. 8.

Afterwards, upon a contest between the executors of both the said wills, the first was proved in the spiritual court; and that probate was confirmed upon an appeal to the delegates; and upon this contest one of the executors having alledged, that the testator, *Sir William Robinson*, died without heirs; it was proved, that *Sarah Palmer*, the wife of the now plaintiff was his heir at law.

Whereupon she and her husband entered on the greatest part of the real estate, supposing that the first will, by which that estate was devised to a charity, was revoked by making another will; and the testator dying without making any other disposition thereof, it must descend to the plaintiff as his heir at law.

And now upon a bill exhibited against her and her husband, by those who claimed under the first will; it was insisted for her, that the suit in the spiritual court was between the contending executors, and that she (tho' she was heir at law) was neither party or privy to that suit, and therefore she prayed that a decree might be made in her behalf as to the *real estate*, and likewise that the first will might be set aside as to the *personal estate*, for though the probate of that will was confirmed by the delegates; yet 'tis now evident, that it was no will, being revoked by a subsequent will.

It was admitted on the other side, that the *making a second will is* *Econtra.* *a revocation of the first*; but that is not the present case; for upon an issue directed out of this court to try, whether the testator revoked his will, which he made in the year 1708, the Jury found, that he did not revoke it, *any otherwise than by making another will in the year 1712*, which last clause was omitted by the clerk of the assise

in drawing up the verdict; and on the *postea* it was returned generally, that he did not revoke it, which being neither the act of the jury nor of the court, application was made to the court of king's bench, to certify that the verdict was drawn up as the jury found it, which was, that the testator did not revoke his first will *any otherwise than by making another will*; and after two motions made in full court for that purpose, the chief justice was inclinable to certify * that it was so; but he was over-ruled by the other three judges, who, tho' they were satisfied in their consciences that it was so, yet would not introduce so dangerous a precedent.

* P. 9.

Therefore it was insisted upon affidavits produced and read of this matter, to falsify that part of the record, either by a new trial, or by any other means the court should direct.

But admitting the second will should amount to a revocation of the first, it shall be taken in a court of equity to be only a revocation *pro tanto*, and that is of the personal estate.

Curia.

As to the *personal estate*, here is a will proved, and that probate confirmed upon an appeal to the delegates, which shall conclude all persons both in law and equity, to make any demands thereof contrary to the said will.

But now here is a subsequent will found by verdict, and that to the satisfaction of this court; but the probate of the first being still in force against those who claim under the second, (if they desire it) the court will grant a *commission of review* in order to set it aside; but if upon such a commission of review the probate of that will should be confirmed by the delegates, there will be an end of the cause, for there cannot be a *review upon a review*.

Oro. Eliz.
57th.

Quere. For there may be a commission of re-examination to examine the sentence of the delegates.

There was no decree made in the principal case.

Rashfeild *versus* Carelesse.

Where collateral proof shall be admitted to shew the Intention of the testator. The executor having a specific legacy devised to him, is a trustee for the residuary part
2 Wil. Rep. 58. pl. 37.
Stra. 568.

THE testatrix *Elizabeth Smallman* (amongst other legacies, particularly 5*l.* to the plaintiff) by her last will and testament devised a legacy of 5*l.* to the defendant (whom she made sole executor without making him residuary devisee) *for the care and pains he might sustain in fulfilling the trusts in her will*; and there being a residuary part of the personal estate after the debts and legacies were all satisfied and paid; the plaintiff, who was of kin to the testatrix, exhibited a bill in this court against the executor, for an account of the personal estate, and to have a *distributive* share thereof, insisting, that a *specific legacy* being devised to the executor for his care in seeing the will performed, he shall be deemed as a trustee for those amongst whom the *residuary estate ought to be distributed*.

“ *Williams*

“ *Williams* for the defendant: the executor is *primâ facie* intitled to the surplus; and something must be shewn to prove the testator’s intent that he should not have it; for otherwise the law gives it him. There has been several cases upon this question, how far the devise of a specific sum should bar the executor of the residue, *Earl and Countess of Gainsborough’s case*. The Earl ^{2 Vern. 252.} by his will devised a particular sum to his wife, and made her ^{pl. 240.} executor, but made no residuary devisee, because when the counsel was drawing the bill, he desired there might be a devise of the surplus to his executrix; but the counsel would not put in such a devise, telling him that the law of course gave the surplus to the executor. And upon a bill for a distribution, the counsel giving this evidence, the court decreed the *residuum* to the executrix, it appearing to be the intent of the testator. *Baal v. Smith*. An ^{2 Vern. 675.} husband devised to his wife some plate, and made her executrix, ^{pl. 602.} and no devise of the residue: and it was decreed by the Lord *Harcourt*, that the devise of the plate would not prevent the executrix from having the residue. *Littlebury v. Buckley*. In the equity court ^{2 Vern. 677.} of the city of *London*, where Sir *P. King*, recorder of the city and judge of that court, decreed a distribution, there being a particular legacy devised to the executor. But that decree was afterwards reversed in the house of lords on collateral evidence, which they admitted to prove the testator’s intent for the executor to have the surplus. *Duke and Duchess of Bedford’s case*, in *Dom’* ^{2 Vern. 648.} *Proc.* ^{pl. 578.}

“ *Talbot* on same side: there are several cases where an executor is looked upon only as a trustee for the next of kin: but they are all founded on the supposed intent of the testator, that the executor was only to have the specific sum devised. But there may be cases, where it is reasonable that the executor should have the surplus, as well as the specific sum. It may be presumed one reason why the testator gave a particular sum, tho’ he intended him the surplus, was lest there should be no surplus, (for personal estate is very uncertain, being always fluctuating :) in which case the executor has an equitable as well as a legal right. On this foundation the cases which have been quoted were adjudged; the supposition of the testator’s kindness to his next of kin is not so strong as an express declaration of a testator, for which reason the house of lords have admitted collateral evidence, as legal proof.”

So likewise in the case of *Harris* and the *Bishop of Lincoln*, where the testator devised his estate to the right heirs of his mother; and proof was admitted to shew, that he intended it for the right heirs of his grandmother, the estate coming from her family; and this was held not to be contrary to the will; and in last *Easter-term* it was accordingly decreed by the present Lord Chancellor.

“ The statute has no relation to this case; because here is a will: and that act extends only to a dying intestate.”

The reply.

To which it was answered, that the present case is not like any of those before cited; and first, as to the *Countess of Gainsborough's* case, the suit was between the heir at law and the executors, to make the personal estate in her hands to be assets in order to satisfy debts, and so far to discharge the real estate, and proof was admitted to shew, that the earl intended his lady should have all his personal estate in nature of a legacy, tho' he had given her a specific legacy in the same will.

2 Vern. 677.
See 10 Mod.
99.

2 Will. Rep.
137. pl.

" In the case of *Littlebury v. Buckley* the devisee expressed no reason for giving the sum of money: only a devise of so much."

" The case of *Harris v. Bishop of Lincoln* was no more than a dispute concerning the identity of a person: and in such case parol evidence has been admitted ever since the statute of distributions."

2 Vern. 675.
pl. 602.

" *Baal v. Smith* was a devise to a wife (executrix) of plate which she had before marriage, and it was held that notwithstanding that legacy, she should have the residue."

* P. 11.

But a proof *debors a will* was never yet admitted; it is true, if a will wants an explanation, evidence may be given to * explain it, but never where it explains itself (as in the present case;) for what can be plainer than a specific legacy given to one *for his care and pains* in performing a will; this is a legacy which implies a negative so as to exclude the legatee from any farther demand out of the personal estate, (*viz.*) that he shall have so much for his pains, and no more; and so it was held by the present Lord Chancellor in the case of *Mayhoe and Lewen*.

But it would be of dangerous consequence to admit any evidence *debors a will*, and repugnant to the will itself, because it is in effect laying aside the will of the testator, and making a new will upon such evidence, which was condemned by the legislature, when the *statute of frauds and perjuries* was made; for to what purpose should any man make a will, if it is in the power of any court to set it aside upon proof of any matter *debors* the will, and make a decree accordingly.

" *Parker* Lord Chancellor being indisposed, *Powys* Just. of B. R. sat in court and made the decree."

" This is a question upon a will, and it hath been *vexata questio*."

" The case of *Foster v. Munt*, Vern. 473. pl. 462. Eq. Caf.

" Abr. 243. pl. 1. 2 Eq. Caf. Abr. 433. pl. 8. 443. pl. 57. was the

" first case, where the Lord Chancellor *Jefferies* was of opinion,

" that any legacy to an executor occasioned a distribution of the

" surplus; for otherwise it is giving all and some. The three

" Lords Commissioners *Maynard, Keck, and Rawlinson*, upon a re-

" hearing of the same cause reversed the decree: but that last de-

" cree was upon appeal to the house of lords reversed, and the first

" confirmed. In *Duke of Beaufort's* case, *Cowper* Lord Chancellor

" decreed a distribution; but that decree was reversed by the house

" of

2 Vern. 648.
pl. 587.
8 Vin. Abr.
194. pl. 21.
in notes.

“ of lords. In law as well as equity, an executor is esteemed but
“ a trustee; for an executor of an executor is continued executor
“ to the first testator *in infinitum*; but not an administrator of an
“ executor, for the executor had no property in the personal estate
“ to go to his administrator. If a man marries a feme administra-
“ trix, who dies, he shall not have the goods of her intestate; for
“ there shall be a distribution. This was Mr. *Harcourt's* case,
“ who married Sir *James Aston's* widow. There are many prece-
“ dents, where a specific legacy bars the executor of the surplus.
“ There is a distinction between giving the executor a legacy gene-
“ rally and specifying the cause for which it is given; for that raises a
“ trust in equity which the executor must perform: it is a trust
“ superadded to the former trust: dangerous to admit evidence *de-*
“ *bors*: best construction is on the will or deed itself; for *littera*
“ *scripta manet*. I once heard it determined, that giving the exe-
“ cutor mourning barred him of the surplus. In Feb. 1720. before
“ Lord *Parker*, *May v. Lewin*, it was decreed that in case of a 2 Wil. Rep.
“ general legacy to an executor, evidence may be admitted, because 162.
“ every thing depends on implication: but otherwise where the
“ cause of the legacy is expressed, the executor in this case, seems
“ to be considered barely as a legatee.”
“ Let there be a decree for a total exclusion of the executor, let
“ there be a distribution, and to that end let the executor account.”

Heron *versus* Newton. At the Rolls.

THE case was, that the testator by his last will and testament ^{Where the}
made two executors, and gave them specific legacies, and by ^{executor}
his said will desired them to be kind to one *Sarah Tuston his old* ^{shall have}
servant, and to give her some small pieces of furniture then in his house, ^{the residua-}
if she desired it: The question in this case was (as in that last men- ^{ry part}
tioned) who should have the *residue* of the personal estate after debts ^{free from}
and legacies paid; and it was decreed that the *executors* should have ^{any distri-}
it free from *distribution*, it being the apparent intent of the testator ^{bution.}
it should be so; for otherwise they could not be kind to his old ^{S. P. in last}
servant, or give her any part of his * furniture, if it was not theirs ^{case, see post.}
to give, and if he left them no assets for that purpose; so that those ^{27.}
words are explanatory of what the testator intended: the bill was ^{2 Wil. Rep.}
dismissed. ^{160.} * P. 12.

D E

Term. Sanct. Mich.

9 Georgii, 1722. In Cancellaria.

The Countess Dowager of Coventry *versus* The Earl of Coventry.

J. C. 2. P. 11 mo 222. Stra. 596. 81st Mod. 463. 11th. Eq. Cas. 1182161. Maxims in Eq. at the end.

Where a defective execution of a power was helped in equity. Eq Abr. 348. pl. 19. Gilb. Eq. Rep. 160. 10 Mod. 463. 2 Eq. Abr. 87. pl. 9. 660. pl. 8. 673. pl. 9. 2 Will. Rep. 222. pl. 58. Com. Rep. 312. pl. 162. Max. in Eq. last case. Stra. 596. * P. 13.

THOMAS Earl of Coventry being seised in fee of several manors, lands and tenements, &c. demised the same to trustees, and their heirs to the use of himself for life; remainder to his eldest son Gilbert for life, with a power to settle a jointure on any wife he should marry, not exceeding 500 l. per ann. so as she brought an equivalent fortune; remainder to the heirs males of the body of the said Gilbert, remainder to the present Earl (the now defendant) and the heirs males of the body, with several remainders over.

Earl Thomas died, and thereupon Earl Gilbert being seised for life as aforesaid, married the plaintiff; and in consideration of the said marriage, and of 10000 l. portion which he had with her, entered into articles, by which he covenanted, &c. for himself, and his heirs, to settle lands according to this power, or otherwise of the value of 500 l. per ann. on her for jointure; and having asked, and being informed by his steward, which of his lands were the most proper to be settled, a draught of a settlement of lands to that value was drawn and engrossed for him to sign, which lay four years, * and was never executed by Earl Gilbert, who afterwards being suddenly taken ill, he devised 3000 l. to the plaintiff, and all his plate, jewels, &c. and 250 l. per ann. to be paid to her for life out of other lands, and died without issue male; so that the said manors, lands and tenements came to the present Earl (the now defendant) against whom the plaintiff, the Countess Dowager, exhibited a bill in this court to have a specific execution of the said power, and that she may retain the lands mentioned in the said settlement, though not executed by Earl Gilbert in his life-time.

For the plaintiff.

And it was insisted for her, that this power given to Earl Gilbert (though he had only an estate for life) ought to be favourably construed in a court of equity; for wherever such a power is given to a tenant for life, who would have been seised in fee, if it had not been

been for that deed by which the *power* itself was created, it shall receive a more favourable construction, than if it had been reserved to one who is a stranger to the inheritance by the rules of descent.

That it plainly appeared by the proofs in this case, that *Earl Gilbert* certainly *intended* to execute this power; for by his direction a deed was drawn for that purpose, which the trustees for the *Countess* disliking at the time the said *Earl* was about to execute it, he sent up to *London* to have another deed drawn, which was done, and returned into the country, and was in the possession of his steward, who being gone from home, the *Earl* died suddenly without executing that deed; so that if it appears to this court, that *Earl Gilbert* designed to execute it, that shall be taken in equity to be good against the present *Earl*, like a will, which though *not signed by the testator* is good in equity to charge the heir at law in the realty, as well as the executor in the personalty.

On the other side it was argued, that not to execute a *power* Econtra. punctually was the same thing as not to execute it at all, and *powers* not executed, are never helped in this court, unless it is to avoid an apparent injury in conscience, though in strictness of law lost, which is not the present case, because it appears, that this lady (the plaintiff) hath a very good provision made for her by the will of *Earl Gilbert* her late husband; for he left her a legacy of 3000 *l.* together with the value of 200 *l.* more of his personal estate, which with the 250 *l.* settled on her for life, and payable yearly out of certain lands is a reasonable equivalent for her fortune.

* As to the case of a will, that it shall be good in equity, tho' * P. 14. *not signed by the testator*, it hath its own reasons; for if he writes his name in any part of his will, it is a good signing, and wills are commonly made *in extremis*, and for that reason they are favoured in equity.

Now in the present case, it appears that *Earl Gilbert* made a will a little before his death, and he might at the same time have executed the deed, if he had intended so to do; but probably he thought that he had done enough already for the plaintiff; and therefore would not lay any farther charge on the lands.

It is true the plaintiff brought a considerable portion in money, and so came in as a purchaser for a valuable consideration; but that will be no reason to charge the present *Earl*, because none of it came to his use; but if it charges any one, it must be either the *heirs or executors of Earl Gilbert*; for he covenanted that he *or his heirs* would settle 500 *l. per ann.* on the plaintiff, which could not be by virtue of the power reserved in the will of *Earl Thomas*, because *Earl Gilbert* had only an *estate for life*, and consequently could not bind his *heirs* to settle a jointure by virtue of that power; so that if his heirs are bound, it must be in another respect, but the defendant can never be bound as heir, because he is the remainder man in tail.

It is true *powers* reserved in a voluntary settlement, as this was by *Earl Thomas*, ought to be favourably construed in respect to him who made them; but it is not so where powers are joined to an estate to charge that of a stranger; but yet there are cases where *powers* reserved in and by a voluntary settlement have not received a favourable construction in this court; as for instance; in the case of the *Earls of Mountague and Bath*, where a power of revocation was reserved in a deed, but it was to be in the presence of *three privy counsellors*; and the *Duke of Albemarle* who had reserved such power, did by his will revoke the deed, but being at that time *governor of Jamaica*, he could not do it in the presence of three privy counsellors; it is true this revocation was held good in equity, but it was upon that particular reason, (*viz.*) because he could not have three privy counsellors there.

But this court denied to help the single circumstance of a mistake in the tender of a guinea.

* Pasch.
4 Annæ.
* P. 15.

So in *Sir * Charles Orby's case* which was thus, (*viz.*) the *Earl of Macclesfield* was tenant for life with a power to make leases for twenty-one years, or three lives, so as the * *old accustomed yearly rent was reserved*; he made a lease for three lives, without any special reservation, but only *yielding and paying the old accustomed rent generally*; and this was held a void lease.

This court will not decree the execution of a power to the prejudice of a third person, when the time for executing that power is lapsed; now a power given to tenant for life to make leases, or to settle a jointure, should be strictly construed, because it enlarges the estate for life beyond its natural duration, to the prejudice of those in reversion or remainder.

So where a woman made a settlement of her lands, with a power to revoke it at any time, in favour of her husband, and she afterwards sent several letters to her lawyer to prepare a deed to revoke that settlement, and to give the estate to her heir, but never executed such deed; this court refused to make a decree, according to what appeared to be her *intention* by those letters; for the decree ought to be founded on what she had done, and not on what she intended to do.

See *Hele v. Hele*, 2 Ch. Rep. 28, 29.

In the principal case, no decree was now made, the Lord Chancellor taking time to consult the judges.

Afterwards this case was argued again in *Easter-term*, Anno 10 Georgii, before the Lord Chancellor, assisted by the *Master of the Rolls* and *Baron Price* and *Baron Guilbert*, and the substance of the arguments for the plaintiff were as follow:

For the plaintiff.

ff. This bill was brought to have a jointure intended to be settled on the plaintiff by virtue of a power in the will of *Thomas Earl of Coventry*, which provides, that it shall be lawful for any person who shall be seised, &c. by virtue of the said will, to settle 500*l.* per annum on any wife he should marry, she bringing an equivalent fortune.

The testator died, and *Earl Gilbert* being seised of the estate for his life, entered into articles to trustees, &c. upon his intermarriage with the plaintiff, by which he covenanted to settle lands pursuant to his power, or otherwise, of the value of 500 l. per annum on her, and got a draught of a settlement to carry the said articles into execution, in which this power was mentioned; and directed that a mortgage which affected some of the lands should be discharged, in order to make the settlement more effectual.

And this bill being brought in the disjunctive, (*viz.*) either to be quieted in the possession of the lands mentioned in the settlement thus drawn, or to have satisfaction from the * heir of *Earl Gilbert*; * P. 16. this court directed an account to be taken what assets of *Earl Gilbert* came to his heirs, which, on the report made thereof, fell short some thousand pounds to satisfy the plaintiff's demands.

And thereupon it was now argued, that these articles ought to be carried unto execution, and the rather, because the plaintiff is a purchaser for a valuable consideration, and the defendant is only a volunteer under the will of *Earl Thomas*; the case being strictly as followeth;

§. Tenant for life, without impeachment of waste, with a power The case. to settle 500 l. per annum on any wife he should marry, and who should bring an equivalent fortune, remainder to the defendant, &c. Tenant for life, upon his marriage, entered into articles, by which he covenanted to settle 500 l. per annum on his intended wife; and in pursuance of this covenant, a settlement of lands was drawn by his direction, but he died before he executed the said deed; now it is a general rule in equity, that where there is a purchaser for a valuable consideration, on articles only, without any other conveyance, those articles shall be carried into execution; and as this is often done in the case of an heir, on the articles of his ancestor, so it ought to be done in the present case.

And those cases where the court would not compel the execution of powers, are where it would be against the will of the donor, they should be executed; such was the case of the *heir in tail*, where this court would not enforce him to suffer a *common recovery*, though his father was decreed so to do, and died in contempt for not doing it.

It is true, where a power is not executed at all, but totally neglected, there may be some reason for a court of equity not to enforce the execution thereof; but where it is executed in any part, tho' not strictly performed, it is the standing rule of this court to make it good.

Now, upon consideration of the circumstances of this case, and the solemnity of the transactions, by drawing a settlement pursuant to the articles, and by the express direction of *Earl Gilbert*; this is a good execution of his power in equity.

Besides, the strict execution of this power was prevented by an accident,

accident, for *Earl Gilbert* called for this settlement in his last sickness, which was ready ingrossed, and in the possession of his steward, who being then gone from home, it could not be had for him to execute before he died, so that the plaintiff hath good equity even upon that foot; and there are * several precedents where articles have been carried into execution against remainder-men, as the case of the *Lord Burlington* versus *Clifford*, and *Hollingshed* versus *Hollingshed*, and *Parker* versus *Parker*, for younger childrens portions, and *Alford* versus *Alford*, in which last case the person who had the power covenanted to execute it before he had it, and whilst it was in contingency; but it afterwards vested in the covenantor, and not being executed by him, it was carried into execution against the remainder-man, and so should this.

Econtra.

Those who argued for the defendant, admitted that the plaintiff was a purchaser in the highest sense, and for the most valuable consideration, which is marriage, and a portion in marriage; yet where she is such a purchaser at large, and of no particular lands, she must take her remedy where the law gives it, and that cannot be of those lands, for certainly she is no purchaser thereof at law.

There are three things relied on by her counsel to make her a purchaser in this court, and those are the *articles*, the *drawing the settlement pursuant to the said articles*, and the *will of Earl Thomas*; and that tho' one of these might not do it, yet *juncta juvant*; and it hath been said, that every wife who brings an equivalent fortune is a purchaser of those lands under that will, and the power thereby created; but this is a very position, because it is essential that every power should be *ad libitum* of him who hath it, till it is executed; so that the plaintiff cannot be said to be a purchaser under this will and power, before that power is executed.

And as to the *articles* so much relied on, and the covenant therein mentioned, to settle 500 *l. per annum*, it is only a general covenant relating to no particular estate or lands, therefore the plaintiff is only a creditor under that covenant at large, which is not like the case of *Hollingshed* and *Hollingshed*, for there the covenant was tied to the very lands in the power, and there were no other to answer it.

It is true, that special forms of words are not necessary in executing powers, and that † infants and femes covert may perform the same, because they are only instruments; it is true likewise, that in the *Lord Burlington's* case there was a *general covenant*, but it did not rest there, for he settled what he pretended was 1000 *l. per annum*, according to the articles, which was afterwards found to be of less value, and appeared so to be by the defendant's answer.

† Contra as to infants, by Verney Master of the Rolls, 9 Vin. Abr 408. in note to pl. 1.

* P. 18. * But the case of the mortgagee, who had a decree in this court against the mortgagor (who was tenant in tail) to suffer a *common recovery*, and he died in contempt of the court in not performing the said decree, yet the court would not carry that decree into execution

execution against the heir in tail, is a very strong case against the plaintiff, the *Lady Coventry*; for in that case the *tenant in tail* had an implied power to suffer a *common recovery*, by virtue of that estate which he had in the lands, and he himself might have been compelled to do it, if he had been living, but after his death his heir was not; and yet he in a greater measure derived his estate under his ancestor, who was tenant in tail, than the present defendant doth under *Earl Gilbert*.

It is true, a *tenant in tail* hath power only by implication in law to suffer a *common recovery*; but there seems to be no material difference between implied and express powers; for wherever the parties are on a level as volunteers, this court will never interpose to favour one more than the other.

It is admitted, that in this case some steps were taken towards a future act, but still all rested in *intention*; and it seems reasonable to have this power or this covenant carried into execution, if there was no other way by which it might be satisfied; but it is plain there were other means by which it may be satisfied, and that is by the personal assets of *Earl Gilbert*; therefore a specific execution of this power ought not to be decreed.

The judges who assisted the Lord Chancellor divided this case into two points:

The opinion
of the judges,
assistants.

(1.) Whether any thing was done by *Earl Gilbert* in consequence of this power, to make it a *lien* on the defendant who was a remainder-man.

(2.) If any such thing was done, then whether the defendant hath any equity to be re-imburshed out of the assets of *Earl Gilbert*.

As to the first question, they held, that *Earl Gilbert* had so far executed the power as to be a *lien* on the estate in the hands of the remainder-man.

When powers were first created by the statute 27 H. 8. they were strictly construed at law, and the reason was to avoid recalling and unsettling estates already settled; and probably for the same reason such powers had no countenance in this court.

* But the power in the present case, which is reserved to a tenant for life to raise an estate, is part of the old dominion which the donor had over his estate, and agreeable to his intention at the very time he made such reservation; and therefore should have a favourable construction in this court.

* P. 19.

That the price here given, (*i. e.*) the portion paid, and the articles executed, are a compleat conveyance, and a good execution of this power; and that ever since the execution of these articles, *Earl Gilbert* was a trustee for the plaintiff, and such trust is assignable and devisable in this court.

That there is but one case cited at the bar against this opinion, and that is the case of the mortgagor who was *tenant in tail*, and was decreed to suffer a *common recovery*, but died in contempt of

that decree, and this court would not carry it in execution against the heir; but the reason may be, because the heir, after the death of his ancestor, was in by the statute *de donis*, which this court could not controul; but if the ancestor had been *cestuy que trust in tail*, his heir would have been bound by such ancestor's *lien*, because in
2 Vent. 350. that case, he would not have been in by that statute.

It hath been argued at the bar, that these *articles* shall not be carried into a specific execution in favour of a volunteer, when there is a plain remedy to be had on the covenant for damages; but that is only where a man is *ad libitum* to perform it or not.

If the trustees by the marriage articles had exhibited a bill in this court to have a specific execution thereof, it would certainly have been decreed for him, and so ought it to be for the plaintiff, especially since the power created by the will of *Earl Thomas* covers all the estate which he settled by that will.

Upon the whole, it might be hard for a court of equity to carry the settlement alone, thus drawn and engrossed, into the execution of this power exclusive of the articles, because the statute of frauds now stands in the way; but this power being bound by the articles, the very draught of that settlement is a good designation of what lands should be settled, and a determination of *Earl Gilbert's* election to raise the 500 *l. per ann.* out of, and by virtue of his power.

2d point.

* P. 20.

As to the second point which is, whether the defendant hath any equity to be reimbursed out of the assets of *Earl * Gilbert*, (*i. e.*) how far those articles will bind his heirs; and as to that matter, the words are to be considered, (*viz.*) that he *or his heirs* would settle lands of the value of 500 *l. per ann. by virtue of his power, or otherwise*; now it hath been said at the bar, that these are technical words writ *currente calamo*, and inserted in the articles without consideration; but this seems to be a mistake, for the words were carefully put in as auxiliary to the real *lien*, (*viz.*) that if his power should happen to be insufficient to settle 500 *l. per ann.* that then it should be done by some other means; and it is probable this marriage had never taken effect, but in consideration of this power, so that the assets of *Earl Gilbert* shall not come in exoneration of the settled estate; for wherever assets are brought in exoneration, there the debt originally charged the personalty.

It is true he had election to raise this 500 *l. per ann.* out of his own assets, or out of his power; but it seems plain, that he intended to raise it out of his power; for here was a deed drawn and engrossed, tho' not executed, by which deed the lands therein mentioned, being of the value of 500 *l.* were settled on the plaintiff in jointure; so that this initiate act, tho' not consummate, is sufficient to shew his intention to execute this power which he was bound by the articles to perform; but if it had been *ad libitum*, there an initiate act would not have been sufficient.

It

Term. S. Mich. 9 Georgii, 1722. in Canc.

It was decreed for the plaintiff, that she was a purchaser of this 500 l. *per ann.* under the will of *Earl Thomas*, and the articles of *Earl Gilbert*, and that, tho' this power was not strictly performed, yet here being a valuable consideration, it shall be carried into execution in this court; that the articles are a sufficient *lien* in equity to carry it into execution; and this being a *lien* ever since the articles were executed, there can be no colour to charge the assets of *Earl Gilbert*; so it was decreed that the plaintiff should have those very lands specified in the deed.

* D E

* P. 211

Term. Paschæ,
9 Georgii. In Cancellaria.

The Earl of Strafford *versus* The Lady Wentworth.

THE case, *ff. Sir John Smith* being tenant for life, made a lease for years, rendring rent payable on such a day, and afterwards died about two of the clock in the afternoon of that day on which the rent was payable; and the tenants having paid the rent to the *Lady Wentworth*, who was the next in remainder, the plaintiff took out administration to the intestate *Sir John Smith*, and then exhibited his bill in this court to oblige the defendant, who had wrongfully received the rent, to pay it over to him, alledging that the rent was due to the said intestate in his life-time.

But it was insisted for the defendant, that the rent was not right-fully due to the intestate until twelve of the clock of that night; though it is demandable before sun-set, for the benefit of the tenants to save a condition, &c. for it is not legally due to the landlord till the last minute of that day on which it is payable; and the tenants having paid it to the defendant who had a right to the remainder, in whose time it incurred, and became due, the plaintiff cannot recover it from her, unless he shews that it vested in the intestate; and to prove this point, the case of *Lord Rockingham* *versus* *Oxenden*, 2 Salk. 578.

ingham pl. 2.
Wil. Rep.
177. pl. 43.

Term. Pasch. 9 Georgii, in Canc.

* P. 22.

Curia.

ingham was cited, (*viz.*) The lessor died on *Michaelmas-day* in the afternoon, and before the setting of the sun; it was insisted for the * executor, that the rent being reserved payable on that day, it might have been paid in the morning, and that a release upon such payment had been a good discharge; but it was decreed in that case, that the rent should go to the heir, because at the time of the death of the lessor, he had no remedy to compel the payment, and by consequence it was not vested in him till the last minute of that day.

The single question is, if this rent was due to the intestate or not, for if it was, then the plaintiff who is his administrator ought to have it.

It is true it was not due from the tenants till the last minute of the day on which it is payable, neither could they be compelled to pay it till after that day; but they having paid the rent, they admitted it was due from them, and it is plain the defendant had no right to receive it; therefore it being paid into a wrong hand who received it without any title, it ought to be paid over to the plaintiff who had a colourable title to receive it as administrator to the intestate.

D E

Term. Sanct. Trin.

9 Georgii. In Cancellaria.

Descarlett versus Dennett.

Bill in Chancery will not lie to be relieved against a wilful voluntary breach of covenant or condition.

“ **D**ENNETT made a lease to *Descarlett* the complainant, for
“ certain lands at *Walthamstow* in *Essex* for nine years, rendring
“ 3*l.* 10*s.* a year, with a clause of re-entry for non-payment
“ of the rent, or non-performance of covenants; in which inden-
“ ture was a particular covenant, that the plaintiff should not suffer
“ persons to make use of a way over part of the lands demised; not-
“ withstanding which covenant, the plaintiff put up a gate at the
“ entrance into the close, and permitted any person to pass over the
“ way requiring them to pay. For breach of which covenant, and
“ for non-payment of the rent, the lessor brought an ejectment,
“ and

“ and had judgment. He also brought several other actions, which
 “ seemed to carry an appearance of vexation. To be relieved against
 “ which judgment in ejectment, the lessee brought his bill in this
 “ court, offering to pay the rent, and satisfy the lessor for the dama-
 “ ges in breaking the covenant.”

“ But the bill was dismissed by Sir *Joseph Jekyll* Master of the
 “ Rolls, for the *Chancery* cannot relieve the non-performance of a co-
 “ venant, or condition, the prejudice in breach of which cannot be
 “ estimated by damages: this tends to the prejudice of the inheritance,
 “ in as much as it may hereafter amount to an evidence for a pre-
 “ scription over the close. The case of an entry for non-payment of
 “ rent is very different; for there the loss is certain, and may be re-
 “ compenced by damages. This hath been a settled rule in equity.”

See stat. 4
 Geo. 2. c. 28.

“ Wherefore the bill was dismissed; tho’ Mr. *Lutwiche* for the
 “ plaintiff argued, that it is hard for his client to lose his lease
 “ when he is willing to make recompence; but by the Master of the
 “ Rolls, it is owing to his own covenant, and to a wilful voluntary
 “ breach thereof, against which this court cannot relieve.”

* The Duchess of Marlborough *versus* Sir John Van- * P. 23.
 burgh, and others:

THE case, *ff.* After the *battel of Blenheim* the parliament
 was so well satisfied with the conduct of the Duke of
Marlborough in obtaining a victory there, that a vote passed the
 lower house, that something might be done by the publick for the
 said Duke, to perpetuate the memory of that service; and at length
 it was resolved, that *Blenheim-house* should be built for him at the
 expence of the publick, and pursuant to that resolution the *Queen by*
her Officers agreed with workmen to build that house.

Where after
 an account
 stated, the
 parties were
 decreed to
 account again
 before a
 Master.

But after laying out 200,000 *l.* in building it, the Duke fell into
 some disgrace, and was charged to give an account what money he
 had recieved of the crown, and how he disbursed it, and the build-
 ing was no longer carried on at the publick expence, but at the ex-
 pence of the Duke: and at that time there was 45000 *l.* due to the
 overseers of this building and their workmen; and * they who set- * Mr. Craggs,
 tled the accounts with them had but 16000 *l.* of the publick money Mr. Sloper,
 in their hands, to satisfy that debt, which they had paid, so that Mr. Lowms.
 there was 29000 *l.* due to them, as the account then stood, for which
 they exhibited a bill in the Exchequer against the said Duke, and
 had a decree in their favour; and now upon an appeal in the house
 of Peers, it was insisted, that the decree ought to be repealed, for
 that the Duke * was not obliged to pay this debt, being a stranger * P. 24.
 to the vote of the house of Commons for building this house, and
 being then out of the kingdom, and never intended to lay out above
 40,000 *l.* in building an house for himself, which he had already laid
 out in carrying on and finishing the building thus begun by the pub-
 lick;

lick; besides, it did not appear that there was any manner of contract made by him, or by any other person by his order or authority, with the workmen, &c. to carry on this work, therefore they ought to take their remedy where by law they could.

It was farther said, that now the house was built, it was of no real benefit to the appellant, because it was so very large, that the furnishing and keeping it in repair would rather be an incumbrance than a profit to any subject; so that there could be no colour to enforce the appellant to pay this debt.

Econtra.

It was insisted for the respondents, that they were *workmen and tradesmen*, and that they built this house in expectation of being paid for their goods and labour, and having no means to compel the payment any otherwise, than by applying to the *Duke*, tho' all their contracts were made with publick ministers, it would be a very great hardship if they should be unpaid, and such an hardship as the circumstances of some of them and their families could not bear; and therefore it would be more reasonable, that the appellant (who enjoyed this house, and had the inheritance thereof) should pay for it, tho' there was no special contract to charge him, than that the *respondents* should be without any manner of remedy for their money; and it being made appear, that the appellant very often approved the building, and gave particular instructions to some of the respondents concerning the same, they had the said decree affirmed in the house of Peers, and that the Duke should pay this debt.

Afterwards the *Attorney General* moved the court, that the *Duke* might be at liberty to file this present bill against the defendants, for that the account settled by *Mr. Craggs*, *Mr. Sloper*, and *Mr. Lowns*, who were employed by the publick, ought not to conclude him, the rather, that since they had no power from him (the Duke) there was no reason their account should bind him; and for that since he had carried on the work on his own account, it was done at a much cheaper rate in every article than when the publick was to pay for it; and now, since the house of Peers had decreed he should pay the workmen, it was reasonable he should have a fair * account from them, and *vouchers* should be produced to the same, especially since it doth not appear, that the house of Lords, who affirmed the decree, ever intended that he should be concluded by the *stated* account; and though this motion was strongly opposed, yet it seemed reasonable to the court to grant it; and thereupon the now plaintiff filed the said bill, the scope of which was, that the plaintiff might have an account of what money the defendants had received for their work in building *Blenheim-house*, and to know what is fairly and justly due to them respectively, in order that the same may be paid.

* P. 25.

One of the defendants, who was an overseer of this building, by his answer says, that he is not to account with any but the crown; and having already accounted, he insists, that he ought not again to be

be called to account for the same thing; and all the defendants say, that they took the *Duke* to be their pay-master, &c.

At the hearing the cause it appeared, that in the warrant to the overseers of this building to proceed in the work, it was expressly mentioned, that they should be accountable to none but to the *Duke of Marlborough*; therefore it was insisted for the plaintiff, who is executrix of the *Duke*, that she should have their account; it is true, there is a great demand made by *Sir John Vanburgh*, but there is no reason that the plaintiff should be saddled with it, because he was an officer for the crown, from whom he had a pension to oversee this work; but if the court should be of another opinion, then it must be considered how much he must be paid, for he insists on 600 *l. per annum* for himself, and 300 *l. per annum* for his assistant, which is very extravagant, because *Sir Christopher Wrenn*, who was generally esteemed the most experienced architect in *England*, had but 200 *l. per annum*, for overseeing the building of *St. Paul's* church; and though these officers and workmen say for one another, that the bills delivered and allowed in the stated account are reasonable, yet there is a convincing proof of the falsity of that assertion, (*viz.*) that since the *Duke* carried on this work at his own charge, it was done at twenty *per cent.* cheaper in every article, than it was carried on before.

Besides, it will appear in proof, that the crown paid for several things which were never done, and that there were several frauds committed by the overseers and workmen; as for instance; there were 600 Half-bricks delivered in, * and reckoned at 800 whole bricks, and that when these officers wanted fruit, they ordered the grocer to send it, and then charged it as candles burnt in carrying on the building; therefore, though there is an account settled with the crown, it is unreasonable it should conclude the *Duke*, who is a stranger to it, and and is now become chargeable in his own right. * P. 26.

They who opposed the plaintiff said, that as to the officers, and particularly as to *Sir John Vanburgh*, that by virtue of the decree made in the house of Lords, the workmen who were employed by him ought to be paid by the *Duke* from the nature of the warrant; and certainly the same reason will oblige him to pay *Sir John*, who employed them, unless some cause can be shewed why the warrant should be effectual to the workmen, and not to the officers by whom they were employed. Econtra.

It is true, *Sir John* was an officer of the crown, and as such he received a constant salary, but that will not oblige him to serve every private man on that account, but rather to have a greater reward when he is employed by a subject; because, to be employed by the crown is such an approbation of his merit, that he must be esteemed in a superior degree than others of the same profession.

It is true likewise, that *Sir Christopher Wrenn* was a very great architect, and had no more than 200 *l. per annum*, for overseeing the
the

the building of the cathedral of *St. Paul's*, but he lived in *London*, and had several other works carrying on there at the same time, whereas *Sir John* was exposed to the fatigues of long journeys to *Woodstock*, and at the expence to have constant lodgings there.

And as to the workmen, most of the arguments of their counsel turned upon the hardship it would be for them to come to a new account before a Master in Chancery, for so great a sum as it hath cost for the building this house, and to produce vouchers for every particular after such a length of time.

Besides, several of the present defendants were the widows, children, and other representatives of the deceased workmen; so that it would be almost impossible for them to produce vouchers for the work done by those whom they represent, after so long an acquiescence under the stated account, upon which they might so much rely as to make them remiss and * negligent of such vouchers, that probably great part of them might be lost.

* P. 27.

Curia.

But the court, after enumerating some of the great actions of the late *Duke of Marlborough*, who carried every thing he undertook by the strength of his great conduct and courage, decreed that the officers and workmen should come to an account before a Master, and that the stated account should not stand in the way.

Hutchinson & al' *versus* Vincent.

Where an executor hath no specific legacy devised to him, he shall have the residuum of the personal estate after debts and legacies paid. See ante 9, 10, 11, S. P.

THE plaintiff had a brother who (as it was suggested in the bill) died seised of a real estate, and possessed of a personal estate of great value; and by his last will and testament, after devised several legacies to particular legatees, and made the defendant *Vincent* executor, and died, against whom the plaintiff and his sister exhibited this bill to have the real estate, and their distributive shares of the personal estate, or of the residuary part thereof after debts and legacies paid.

The defendant by his answer sets forth, that the testator, by his last will, devised a legacy of fifty pounds to his brother the now plaintiff; but left nothing to the other plaintiff his sister, and that he made the defendant executor, but left no specific legacy to him, so he insists, that he as executor is entitled to the *residue* of the personal estate of which the testator died possessed, and denies that he was seised of any real estate, or if he was, the defendant disclaims all manner of right to it.

For the plaintiff.

Those who argued for the plaintiff insisted, that tho' the defendant is made sole executor by this will, which after a long contest is now established; yet as this case is circumstanced, the defendant ought not to have the whole personal estate, but shall be presumed as a trustee for the next of kin of the testator, unless it can be shewed, that it was his intent his executor should have the whole.

Now by this will it stands indifferent, whether the testator intended the benefit should be either for the *Defendant who was his executor*, or for *his next of kin*; but it is in proof, that he very often expressed a great regard for his brother and his children; therefore it cannot be presumed he intended his estate for a stranger.

It was argued for the defendant, that nothing appears upon the face of this will, to induce the court to intend the * defendant to *be a trustee for the next of kin*; therefore the presumption must be, that he intended the estate for the defendant; and tho' there are few cases in point, yet the reason which governs some other cases of the like nature, may likewise govern this, but there is no case to prove that an executor is a trustee barely by being appointed executor. Econtra. * P. 28.

And it may be some reason to induce the court to decree in favour of the defendant, when it shall be considered what vast expence he hath already sustained in the contest of this will; for first the plaintiff contested it in *Doctors-commons*, and after sentence there for the will, he appealed to the delegates, where that sentence was affirmed; then he indicted several of the witnesses for perjury, who proved the will, and they were all acquitted, there being no colourable proof against them, so that having been defeated at law, and in the spiritual court, he now makes his last attempt in chancery.

An executor hath certainly the whole and entire right to the testator's personal estate both in law and in equity, unless upon the face of the will it appears by some indications, that the testator intended to the contrary, as by giving him a specific legacy; for by such a devise it appears, that he intended him no more. Curia.

And this was laid down as a rule, when the Lord Jeffries was Chancellor, and with good reason, and hath been a standing rule in the court ever since (with some little variations and exceptions from the circumstances of cases) to exclude the executors.

But the executor in the present case having no specific legacy devised to him, it doth not appear but that the testator intended the whole personal estate to him; therefore this bill was dismissed, but without costs, upon condition the plaintiff shall not trouble the defendant with any farther demands. 1 Vern. 473.

Spencer versus Chase.

THIS was a bill exhibited by the plaintiff against the defendant, to have an account of what was really due to him, and to have a reconveyance of the estate upon payment of the money, &c. Devise of lands to trustees and their heirs, until his son come to the age of 25 years; he mortgaged the lands at 21 years of age, it is void. * P. 29.

The bill sets forth, that the defendant had imposed on the plaintiff when *under age*, and had got several bargains made between them, which he compelled the plaintiff to execute * since he came of age, and particularly a mortgage of an house in *Russel-street in Bloomsbury*, which the defendant now claims as an *absolute sale*; and

and that he persuaded the plaintiff to mortgage other lands to him (the defendant) to secure the repayment of 640 *l.* when in truth, he (the plaintiff) never received above 320 *l.* of him upon any account whatsoever.

The defendant by his answer denies any trust of the house in *Russel-street*, but insists, that it was an absolute sale thereof to him, and as to the mortgage-money he could not remember the several sums he had paid to the plaintiff, but affirmed that he had paid several sums to him, and discharged several of his notes to other persons; but cannot tell when, or to whom such notes were payable, or who were witnesses to them, having cancelled them at the time he took this mortgage for his security; but that he had actually paid to the plaintiff 101 *l.* 10 *s.* and 60 *l.* more, and delivered a chaise to him, in all, to the value of 200 *l.* and upwards, but denies any imposition on the plaintiff, and insists, that he may be allowed 210 *l.* the plaintiff had of him over and above the 640 *l.* secured by the mortgage, besides his charges and bills of fees and expences, as an attorney for the plaintiff, which were not yet made up, but insists that they should be allowed on the account.

For the
plaintiff.

It was argued for the plaintiff, that from the nature of this transaction he had a very hard case; for it appeared in the cause, that he was an attorney's clerk, and being very extravagant was encouraged, supported and supplied by the defendant in that way of living, he being another attorney in the neighbourhood, and who knew the plaintiff was entitled to the said house and lands whilst under age; and having been supported in his extravagancies with several small sums of money at several times by the defendant, he threatened this young man, as soon as he came of age, to send him to gaol if he did not repay the money; and thereupon he extorted from him both this conveyance of the house in *Russel-street*, and the mortgage of his other land.

Now this house is very well tenanted, being a good house, and let for 40 *l.* *per annum*, and the plaintiff who was entitled to the reversion after the death of an old life then in being, sold it to the defendant for 100 *l.* who within a few days afterwards sold it to one *Hucksley* for two hundred pounds.

* P. 30.

* And as to the mortgage-money, even the defendant cannot shew any particulars of money paid by him, more than the plaintiff hath set forth in his bill; so that he must come to an account for that money, and ought likewise to account for the profits of the house in *Russel-street*, notwithstanding the pretended conveyance thereof was made by him after he came of age, because it was extorted from him in the manner as already mentioned.

Contra.

But as to that matter, it was answered by the defendant's counsel, that there was no colour to make him account for the profits of the house in *Russel-street*; for tho' *Hucksley* gave him 200 *l.* for it in a little time after he (the defendant) bought it of the plaintiff; yet that was

was a great deal more than the real value, it being bought for the conveniency of the purchaser, whose house was contiguous, and that there was no colour to avoid the sale thereof, because there was no manner of proof, that the plaintiff was imposed on or circumvented.

And as to the mortgage-money, there being a cross bill exhibited against the plaintiff, he owns in his answer, that he had received several considerable sums of the defendant; therefore if he (the defendant) shall be made subject to account, and it being very hard to prove every particular disbursement made by him in behalf, and for the use of the plaintiff, it may be reasonable that he should be examined upon interrogatories, and that the defendant's bill of costs, and all other his demands may be brought into the account and allowed.

But upon reading the will of the plaintiff's father, which was his title to the *mortgaged lands*, it appeared to be a devise of the said lands to trustees and their heirs, until the plaintiff came to the age of 25 years, and then in trust for him and the heirs of his body, remainder to the right heirs of the father.

And it appearing, that the plaintiff was not of the age of 25 years when he executed this mortgage, but of the age of 21 years, and no more, so that expressly by his father's will, he was not to take till four years after the mortgage was made; the court was of opinion, that it was void in law; for if it was a contingent and executory devise to the plaintiff, it is plain he had no title till the contingency should happen; but if the estate-tail was executed in him, then he might make a title by suffering a common recovery, but let it be either way, he was now of age, and ought to pay or secure what is justly due to the defendant.

* But as to the sale of the house in *Russel-street*, it was an imposition on the plaintiff, for the defendant bought it for less than three years purchase; therefore he ought to make an allowance for what he sold it more than he paid for it to the plaintiff. * P. 31.

And the mortgage was decreed to stand as a security for what should appear to be justly due to the defendant, of which the Master was to take an account, and that the plaintiff should have his costs to this time, to be deducted out of what shall appear to be due to the defendant; and that upon payment thereof the defendant shall reconvey.

But upon non-payment the plaintiff shall suffer a common recovery for the defendant's security, and be foreclosed according to his prayer in the cross-bill; and if the defendant is willing to be at the charge, the plaintiff shall suffer a recovery immediately, lest the defendant should die before what is due to him shall be paid.

Bertie *versus* Lord Chesterfield, at the Rolls.

The husband's estate in the hands of another is subject to the funeral charges of his wife.

THE case, *ss.* The plaintiff *Mr. Bertie*, was desired (as suggested in the bill, but not proved) by the late *Earl of Caernarvan*, to see his Lady buried; and thereupon the plaintiff employed an undertaker of funerals to bury the said lady, expecting to be repaid what he should lay out in the funeral expences, by the defendant the *Earl of Chesterfield*, to whom the *Earl of Caernarvan* had devised 6000 *l. per annum*, subject to the payment of his debts; but he refusing to pay the said charges, the undertaker brought an action at law against the now plaintiff, and recovered 270 *l.* for this burial.

Thereupon the plaintiff exhibited a bill in this court against the defendant, to discover assets in his hands of the *Earl of Caernarvan's estate*, and to subject the same to the payment of this money for the burial of his lady.

It appeared in this cause, that there was a settlement of separate maintenance made for this lady, and that she had power to dispose it by will, and that accordingly she made a will, and thereby devised several legacies to persons therein mentioned, and constituted the now plaintiff executor thereof; but it was insisted for him, that settlements for separate maintenance shall never extend to funeral charges; and tho' the Lady had made a will, and the plaintiff * executor, yet it appeared she had given away more than she had to dispose.

* P. 32.

For the defendant.

It was said for the defendant, that since the plaintiff was made executor, and had of his own accord taken upon himself the burial of the testatrix, there could be no reason to charge the defendant, for there could be no equitable charge on my *Lord Caernarvan's* estate in the defendant's hand, unless the plaintiff was desired to oversee and take care of this burial of his lady; and altho' that did not appear to be the case; yet because the plaintiff took nothing of her estate, by being made executor, for she gave away the whole in legacies,

Curia.

It was decreed, that the husband's estate is subject by law to pay the funeral expences in burying the wife, therefore the plaintiff shall be re-imbursed out of *Lord Caernarvan's* estate in the defendant's hands, together with his costs at law, and in this court; but his bill was dismissed with costs, as far as it related to the undertaker, who was made a party to this suit.

Lawly *versus* Lawly.

THE case, *ff. Sir Francis Lawly* had issue *Sir Thomas*, who had issue *Sir Thomas*, the now plaintiff; and the said *Sir Francis*, upon the marriage of his son *Thomas*, settled several lands on trustees, &c. in trust for the said *Sir Francis*, during his life, remainder to his son *Sir Thomas* for life, remainder to the first and every other son and sons *Sir Thomas* in tail male, with a power to either of them when in possession, to make leases of any part of the said lands for twenty-one years, or three lives; provided, that if the Lady *Lawly* should survive *Sir Francis* and *Sir Thomas* her husband, then in trust to permit her to receive the rents and profits of these lands during her life, *as the same were at that time let*.

Lands were settled in marriage on trustees, &c. that if the wife survived, then she should receive the profits as they were then let; the husband made leases and advanced the rent: decreed, that the heir at law shall have the advanced rent.

Sir Francis died, and *Sir Thomas* entered and let those lands at an advanced rent, and died, and his lady received the said rent during her life, for several years, and made her will, and the defendant executor thereof, and died.

And now the plaintiff exhibited this bill as heir at law to *Sir Thomas* and *Sir Francis* his grandfather, to have an account of the executor of the *Lady Lawly* of the overplus of the rent received by her in her life-time, and what hath been received by the said executor since her death, and that it may * be paid to him, for that he * P. 33. is entitled to it as heir at law, as aforesaid.

The defendant answers and says, that if the *Lady Lawly* received more than she ought, it was above fourteen years since; so pleads the statute of limitations; and if that should not be allowed, then he says that he hath not assets, but what is sufficient to answer debts of an higher nature affecting the same.

But the defendant was decreed to account, and that what shall appear to have been received by the lady more than she ought to receive (being the improved rent) shall be paid to the plaintiff out of her assets; and what hath been received by the executor since her death shall be paid out of his assets.

Curia.

And as to the statute of limitations the plea was disallowed, because the estate in law was in trustees; and the defendant was ordered to pay costs.

Statute of limitations, no good plea where the estate in law is in trustees.

Carrick & al' *versus* Errington.

THIS was a bill exhibited by the plaintiffs *Carrick* and two others, as heirs at law to *Edward Errington*; and it was to avoid and set aside a conveyance obtained by the defendant by fraud, suggesting, that the said *Edward* was a weak man in his intellects, bringing their bill in equity.

Where papists are not disabled by the statute to bring their bill in equity.

² Will. Rep. 361. pl. 104. Moseley 8. pl. 8. ² Eq. Cas. Abr. 623. pl. 13. 624. pl. 20. 625. pl. 21, 22, 23.

and that he conveyed the lands, &c. to trustees and their heirs, in trust for *Thomas Errington*, for life, remainder in trust to his first, and every other son in tail male, remainder to *William Errington* in like manner; and all this in consideration only of 200 *l.* for which reason it appeared to be a fraud and imposition on the said *Edward*.

The defendant pleaded, that two of the plaintiffs are papists, and consequently disabled to bring this bill by the statute 11 & 12 *Will.* 3. for that they cannot take by descent from their ancestor; and as to the other plaintiff there is nothing in the case but what may be tried at law, (*viz.*) what was the consideration of this conveyance; and it is plain, that the defendant *Errington* was eighteen years of age and upwards, when the aforesaid statute was made, consequently not within the penalties; therefore it ought to be tried at law, whether the plaintiffs are capable to recover, or the defendant capable to take by this conveyance; for it is probable that it may appear

* P. 34. *Edward* had some other consideration * to make this conveyance; besides, the 200 *l.* therein mentioned.

But admitting the first limitation to *Thomas* is void, he being incapable to take, because he was a *papist*, yet the limitation over to *William* is good, and shall vest immediately.

But that was denied by the court, for the contrary was settled in the *Dutchess of Hamilton's case*, (*viz.*) That tho' the first limitation is to a *papist*, who is disabled by the statute to take; yet it is not such a void limitation, so as the remainder shall immediately vest, as if the first was dead without issue.

Besides, this estate is more likely to continue in a protestant family, by supporting this conveyance, than by destroying it, for *Thomas Errington*, the *papist*, is an old man and hath no issue, but *William*, who is the next in remainder, is a protestant.

For the plaintiff.

The counsel for the plaintiff argued, that it was proper for him to apply to this court, because it was to discover a fraud, and for that the legal estate was, and is in trustees; so he must come into a court of equity to set the deed aside.

And if it is set aside, the plaintiffs must take as heirs at law to *Edward*; for tho' two of them are papists, yet they were above the age of eighteen years at the time this statute was made, and consequently not subject to the penalties therein mentioned.

But admitting they were all papists, and incapable to take, yet certainly they are capable of coming into a court of equity to set aside any conveyance fraudently obtained from their ancestor, and the rather, because it may happen that the next of kin, who is a protestant, may not be willing to be at the expence of a suit in Chancery for such a precarious interest, as to receive the profits of an estate until the heir at law becomes a protestant; so that a fraudulent deed shall carry the estate.

Besides, it was settled in *Roper* and *Ratcliff's case*, that the heir at law, tho' a *papist*, is capable to take the inheritance, for it is in him

him, tho' the next protestant of kin hath the *pernancy of the profits* till the other becomes a *protestant*; and the trust limited to support contingent remainders cannot be said to be a trust for a papist, nor shall the remainder-man in this case take immediately, supposing the limitation to *Thomas* to be void as to himself, because he * was a * P. 35. *papist*, for if he should take immediately, then this absurdity would follow, (*viz.*) all the contingent remainders to the sons of *Thomas* would be void; and it could never be the intent of the donor, that *William* the remainder-man who gave no consideration, should immediately have the estate, for all the consideration moved from *Thomas*, and the only consideration mentioned in the deed is money, so so no other shall be averred.

There was no decree made, but a reference to a Master to inquire ^{Curia.} what was the consideration of this deed, if any; and as for what was offered, that two of the plaintiffs were eighteen years old at the time of making the statute, and consequently out of the penalty, the court was of opinion, that they were out of the letter of the act, but within the intent and meaning of it; for the lawmakers could never intend to put infants of tender years in a worse condition than those who were of age; but be that as it will, the plaintiffs are proper to make application here as heirs at law to *Edward Errington*.

Savage versus Foster.

It. when before Lord King on a bill of review
Miln. App. R. 20 D.
THE case, *ff. Margaret Smith* being seised of the lands in question upon her marriage with *Peter Flavill*, settled the same upon trustees and their heirs, to the use of the said *Peter* for life, then upon *Margaret* his intended wife for life, remainder after the death of the said *Peter* and *Margaret* to the heirs of the said *Peter*, on the body of the said *Margaret* to be begotten, remainder to the right heirs of the said *Margaret* for ever. ^{Where a person knowing his own title, and not giving notice of it to a purchaser, shall never set it up against the purchase.}

The said *Peter* and *Margaret* had issue only one daughter (the now defendant) who was married to one *Foster*.

Peter Flavill died, and then his widow married one *Brown*, by whom she had issue one other daughter, and no more, which daughter being courted by one *Williams*, but he refusing to marry her without such a fortune, which *Margaret* her mother was not able to give without breaking thro' this settlement, conveyed the said lands to the aforesaid *Williams*, &c. and the defendant *Mrs. Foster* and her husband who knew that the lands were settled on her in tail as aforesaid, solicited her mother *Margaret Brown* to make a conveyance in favour of the said *Williams*, and were assisting in carrying on the marriage between him and her half-sister *Brown*.

* Whereupon the said *Margaret* conveyed these lands, &c. to the use of herself for life, remainder to *Williams* and his heirs; then the marriage took effect; and afterwards *Williams* sold these lands to the plaintiff *Savage*, who entered and built an house thereon. * P. 36.

And

And now *Mrs. Forster* who was the issue in tail, by virtue of the said *settlement*, and endeavouring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that *settlement*; for that she having full notice of the purchase, and of her own title, she gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a feme covert, but that she should be concluded by this fact as well as if she was an infant.

For the defendant.

It was argued for the defendant *Mrs. Foster*, that two things are necessary to bind the right in cases of this nature; the one is, that the party must know his own title to the lands; and the other is, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title; for it would be of dangerous consequence if the bare permission of him to proceed in the purchase should be a foundation to bind his right in this court on the foot of fraud.

It is true, the defendant knew she had a title under this *settlement*, but she apprehended she was not to take till after her mother's death; she knew likewise that her sister was about to marry with *Williams*, but did not know upon what terms; but if she had known the terms of that marriage, she was then a feme covert, and her husband ought to have given the plaintiff notice of her title; therefore his negligence shall not prejudice her who had done nothing to lose her inheritance, and the entire benefit of this *settlement* for ever.

Econtra, for the plaintiff.

On the other side it was first denied, that the two things before-mentioned by the plaintiff's counsel are necessary to have relief in cases of this nature; the one, that the party should know his own title, and the other, that he should be instrumental in carrying on the purchase by another, without giving him notice of such title.

It is true, he ought to know his own title, and that must necessarily be intended in this case, because the defendant had the custody of this deed of *settlement*; but it is not necessary that the person interested should be active or instrumental in carrying on the agreement in order to a purchase; for * if the party knew his own title, there can be no danger that his right should be bound by the purchase, because it was in his power to help himself by giving the purchaser notice of such right; and though this defendant was a feme covert, yet it was a fraud in her not to give the purchaser notice of her right; and therefore it shall be bound for ever, and the rather, because the defendant solicited her mother to make this conveyance in favour of *Williams*, upon the marriage of her sister, and for that the plaintiff hath entered and built on the lands.

* P. 30.

Curia.

Where there is a *parol agreement* made for a lease, and the lessee by virtue of such agreement enters and builds, this court will establish it on the foot of fraud in the lessor, notwithstanding the statute of frauds, &c. because contracts executed in part are not always within the statute, though executory contracts are.

Now

Now this bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder *settlement*, though she was privy to, and assisting in carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser.

Now when any thing in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser *notice* of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to *give notice* of his title to the intended purchaser, and in such case *infancy or coverture* shall be no excuse; for tho' the law prescribes formal conveyances and assurances for the sales and contracts of *infants*, and *feme coverts*, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this court will relieve against that right, if the person interested will not give the purchaser *notice* of it, knowing he is about to make the purchase; neither is it necessary, that such *infant or feme-covert* should be active in promoting the purchase, if it appears, that they were so privy to it, that it could not be done without their knowledge.

* Therefore it was decreed, that the defendant should levy a fine to the plaintiff, to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant shall levy the fine quietly, and without delay, then the plaintiff shall have no costs, otherwise he shall pay costs. * P. 38.

And the case of *Watts* versus *Hafewell* was now remembered, where tenant for life borrowed money, and his son who was the next in remainder, and an infant, was a witness to the deed of mortgage; this court gave relief on the foot of fraud, because the infant did not give the mortgagee notice of his title.

So in the case of one *Clere*, who was an infant, and *clerk* to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him; and for that reason his mortgage was postponed on the foot of fraud.

Nota; in the next sessions of parliament, the defendant petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition, but it was rejected for not coming in time.

Dowse versus Rue.

The subsequent mortgagee prays to redeem the first mortgage upon payment of what was due, and pending that suit, the first mortgagee sets up another mortgage prior to them all: decreed a trial at law, whether that mortgage was executed; and if it was, how much money was paid on it.

* P. 39.

UPON an appeal from a decree at the *Rolls*, the case was thus, *ff.* The defendant *Mrs. Rue*, whilst a feme sole lent 100 *l.* to the mortgagor, who, for securing the repayment thereof, made a mortgage of the lands to her, dated in *April* 1700.

Afterwards the defendant married *Mr. Rue*, who being a *seafaring man*, and having a pension or half-pay from the government, proceeded in a voyage to serve the *Czar of Muscovy*, and left a letter of attorney with his wife to receive his pay as it should become due.

Afterwards the mortgagor of these lands borrowed 600 *l.* more of one *Mary Sherlock*, and for securing the repayment thereof with interest, he mortgaged the said lands to her by deed, dated in *Aug.* 1701. which was a year after the mortgage for 100 *l.* to the defendant *Rue*, who assigned the said mortgage of 100 *l.* to another in her husband's absence, pretending she had a power so to do, and produced a letter of attorney (as she pretended) under his hand for that purpose; * but as soon as he returned, he brought a bill in equity against the *assignee*, and had a decree for a reconveyance on payment of 150 *l.* which was paid by the said *assignee* to the wife, upon her assignment of the said mortgage.

Then the plaintiff *Dowse*, in right of his mother-in-law, *Mary Sherlock*, who had the subsequent mortgage for 600 *l.* exhibited this bill against the defendant *Rue*, and the *assignee*, to have a fair account, and to have an assignment of the prior mortgage of 100 *l.* upon payment of what shall appear to be due thereon; and the rather, because the said first mortgagee had all the deeds and title of those lands which were left in her possession by the mortgagor, so that the plaintiff, who was the subsequent mortgagee, might be easily deceived.

But now pending this bill, the defendants set up another mortgage of those lands to them for securing the payment of 200 *l.* with interest, which mortgage was dated 28 *March* 1700, about three weeks before the mortgage in *April*, for 100 *l.* but it being denied by the plaintiff, there was a decree made at the *Rolls*, that it should be tried at law, whether the deed dated 28 *March* 1700, was executed, from which decree the plaintiff now appeals, for that it was too short; for if upon the trial it should appear, that such deed was executed, yet the money therein mentioned might be paid in part or in the whole; therefore it should be directed to be tried in like manner, whether that money, or how much thereof was paid.

For the plaintiff.

But it was insisted for the plaintiff, that this mortgage of 200 *l.* should be set aside without a trial at law, because it appeared that the mortgagor had a title to those lands by lease for thirty-four years; and in the mortgage dated in *March*, he recites it to be for thirty-eight

eight years, so that it is very unlikely he would mortgage it for *four years* longer than he had in it; and in *April* following he mortgaged it to the same person for thirty years, to commence immediately; and this was very extraordinary in the mortgagee to take a second mortgage of the same lands for a shorter date and time than the first, when the money lent and secured by this second deed might have been better secured by indorsing it on the mortgage dated in *March* before.

Besides, if a subsequent term of the same premises was taken in *April*, and to commence at the same time, that will be a surrender in point of law of this deed in *March* before.

* It was admitted at the *Rolls*, at the hearing this cause, that if * P. 40. the deed in *April* had been to secure a greater sum of money than the deed in *March*, it might have been presumed to have been made in satisfaction of the first sum; but it may be as well presumed, that the mortgagor paid 100 *l.* of the 200 *l.* and gave the second mortgage in *April*, for the securing the payment of the other 100 *l.* and neglected to cancel that in *March*.

Besides, the defendant was never in possession by virtue of this mortgage dated in *March*, neither was the principal or any interest demanded in twenty years.

But it was insisted for the defendant, that no alteration ought to be made in the decree at the *Rolls*, but only, that it may be directed to try if any part, and how much of this 200 *l.* was paid; and thereupon it was decreed, that it should be tried at law, whether this deed was executed; and if it was, then whether the whole, or any part, or how much of the money was paid. Curia.

Reynolds versus The Lady Tenham.

THIS was a petition preferred to the Lord Chancellor by Mr. Reynolds, the grandfather of an infant of the age of seven years, to have him taken out of the custody of his mother (the defendant) being a *papist*, and to be delivered to Serjeant Banes, and another named by the petitioner, that he might be educated in the protestant religion. Guardianship of an infant is not assignable to another. 2 Eq. Caf. 486. pl. 16.

It appeared by several *affidavits* ready to be produced, that this infant was entitled to 1700 *l.* per annum, as tenant in tail in remainder, after the determination of the estate for life of his said grandfather; and it was insisted for the petitioner, that it might be of very ill consequence, that the education of this child should be left with a *papist*, who might instil the principles of that religion in an infant.

That the father of this infant said on his death-bed, that he expected his father (the petitioner) would take care to educate this child in the protestant religion, and not leave the education of it to his wife, who was a *papist*; but he being now dead, and the grandfather

ther (the petitioner) very old, and for that reason unable to take the guardianship on him; he desired that two of his friends in whom he reposed an entire confidence, and to whom he assigned the guardianship, might have the education of this infant.

* P. 41.

* Thereupon the court inquired, whether those persons were willing to take this charge upon themselves; and one of them, (*viz.*) *Serjeant Banes*, being present, said, that he had received several favours from *Mr. Reynolds*, the petitioner, and therefore was willing to serve him in any thing with which he should be entrusted; and that if the court thought it proper he would take this charge upon himself.

Econtra.

But the defendant, the *Lady Tenbam*, did by her counsel oppose the making any order upon this petition, for that it appeared by the oath of the *Earl of Litchfield*, then in court (who was the godfather of this infant) and by the oaths of several other persons, that this Lady had so great a regard to what her husband in his life-time desired, as to the education of this child, that she directed he should be baptised by a minister of the *church of England*, and that he is constantly attended by such a minister ever since he hath been capable of any instruction, and particularly he hath been taught the *church catechism*.

Besides, the petitioner deserves very little favour as to this matter, because he having 1700*l. per annum*, as aforesaid, was so hard to his own son (the father of this infant) that he allowed him no more than 40*l. per annum* for his maintenance, and would never see him since his marriage with the defendant, and had never seen this infant, his grandchild, or desired to see it; therefore it would be very hard to take a child from a mother, at the instance of a grandfather, who was so very unkind to his own son, and to commit it to the care of strangers (for he doth not desire the guardianship himself) and the rather, because the mother is willing to give any security the court shall approve, that this child shall be educated in the protestant religion, and that the *Earl of Litchfield* would be one of her securities, or otherwise, that this child might be delivered to that noble Lord, or at least, that he may be one of the *Guardians*, and that she may have the liberty of seeing her own child, and not be deprived of that comfort which all other mothers naturally enjoy.

Curia.

This Lady hath been married to two protestants, and still continues a *roman catholick*, and probably to her honour so to do, being convinced she is in the right; but tho' her honour hath got so far the better of her principles, as to educate this child a protestant, according to the desire of her husband, yet it is to be feared, that she will always have such persons about her as may instil the principles of another religion in his mind, and make a wrong impression on his tender years.

* P. 42.

Besides, if this was not to be feared, it might be more advantageous for the child to be under the care of some other persons, and

and not of his mother, who by her indulgence and fondness might do it an injury.

Therefore it was ordered, that the child should be delivered to those persons whom the grandfather (the petitioner) had appointed to be *guardians*, but so as the mother may see him at any time.

But this decree was reversed in the house of Lords, upon the appeal of the *Lady Tenham*, and there resolved, that these words of her husband on his death-bed, (*viz.*) *That he expected his father* (the petitioner) would take care to see this child educated in the protestant religion, were a good appointment to make the grandfather guardian.

That the appointment of a *guardian* is a bare power and trust, and not assignable, as it hath been resolved in * *Bedle and Constable's case*; and about three years since in the *Duke of Beaufort's case*, whose father had appointed the *Duke of Ormond* guardian; but he being attainted of high treason, and so made incapable, another guardian was appointed by act of parliament, it being not to be done by any other power.

Therefore the petitioner the grandfather was ordered to take the guardianship upon himself in person; for that he could not assign his power to another; and this is agreeable to another decree made in the house of Lords, in the case of † *Forster versus Denyon*.

* Vaugh. Rep. 237.
† 2 Chan. Cas. Rep. 237.

Steed versus Cragh, at the Rolls.

THE defendant being a *feme sole*, and possessed of a long term for years, afterwards married with *W. R.* who made an *underlease* to *L. R.* for ten years; and in some short time after, having occasion for money, he borrowed it of the said *L. R.* the underlessee, and covenanted that he would grant him another lease of the premises, to commence after the expiration of the said term for ten years, and to continue during the time he had any right, &c. but died before he made such lease.

A long term of years was vested in the husband in right of his wife, he made an underlease for ten years; and upon borrowing money of the lessee,

covenanted to grant him another lease after the end of the ten years, and to continue during the time he had any right, but died before he made such lease: decreed that this was a good disposition of the term in equity.

* *L. R.* the underlessee assigned his term of ten years to *B. B.* and also all his right which he had by virtue of this covenant, and then *B. B.* by his last will devised the same to the plaintiff *Steed*, who entered, and was possessed, and the term for ten years being expired, the now defendant (who was plaintiff at law) brought an ejectment; and thereupon the plaintiff exhibited a bill to be continued in the possession of the lands by virtue of the said covenant, and that the court might declare he had a right under it, and grant an injunction to stay proceedings at law.

* P. 43.

The defendant demurred to the bill, suggesting, that if there was any such *covenant*, it was only a bare agreement between the parties, and rested in covenant, which could only charge the executors or administrators of the covenantor; and that she claims neither as executor or administrator, but by virtue of that right which she had paramount that of her husband; and therefore insisted that this bill might be dismissed with costs.

Econtra.

But the counsel for the plaintiff argued, that this *covenant* was a good disposition of this term in equity, and that it was not prayed in the bill, that the defendant should be obliged to carry this covenant into execution, but that the court would declare it to be a good disposition of the term in equity; and thereupon to grant an injunction against the defendant.

And accordingly it was decreed at the *Rolls*, that this covenant was a good disposition of the said term in equity, because the husband had a power to dispose it; and that the * covenant was such a *lien* as bound the right, in whose hands soever it went.

* See Poph. 4.
1 Vernon 396.

Anonimus.

The husband possessed of a term in right of his wife, was divorced, a mensa & thoro, and an injunction was granted, he being about to sell this term.

* P. 44.

THE case was, *ff.* A *feme sole* being possessed of a term for years, married *W. R.* who was afterwards divorced a mensa & thoro, and she had *alimony* allowed to support her; and now the husband intending to sell this term, her counsel moved for an injunction.

Which the court denied at first to grant, because the separation a mensa & thoro did not destroy the marriage, for the parties were still husband and wife; now supposing the husband had been entitled to this term in his own right before marriage, and afterwards had been divorced from his wife, and she had alimony allowed, this court would never * have granted an injunction to hinder him from selling; and certainly whilst the marriage continues, he hath the same power to dispose the term, which he hath in right of his wife, as he had if it had been in his own right.

But her counsel still pressing for an *injunction*, so that the merits of the cause might come before the court, and insisting very much on the hardship of the case, and that the wife could have no remedy if this term was sold.

The court granted an injunction; for though the marriage continues notwithstanding the divorce, yet the husband doth nothing as husband, nor the wife as wife.

The

The executors of *Devallar versus Herring*; before the Barons of the Exchequer at Serjeants-In-Hall in Chancery-lane, in Trinity-vacation.

THE case, *J. One Smith* who was a proprietor of an annuity ticket in one of the publick funds, sold it to *White*, who sold it to *Devallar* a single man, who made the plaintiffs his executors, and died. Trover for an annuity ticket, the plaintiff was nonsuit.

The plaintiffs coming to his house after his death, found one of his scrutores opened, which they suspected to be done by one *Powell* his man-servant, by the contrivance of the servant-maid, they being the only persons in the house, and are since intermarried.

Upon examining the books of account, the plaintiffs found an entry made of an annuity ticket bought of *White* on such a day, which was a little before his death; and that ticket being now lost, the plaintiffs advertised it in the publick papers with a promise of a reward to any person who should produce it, and to stop it before it passed the office.

But this advertisement being not made till about two months after the testator's death, the ticket was sold before that time in *Exchange-alley*, and passed thro' several hands till it came to the defendant *Herring*, who purchased it for a valuable consideration, and had it transferred at the office to himself as from *Smith* the first proprietor, whose name was endorsed; and a blank space left over it to fill up the endorsement as usual, all which was done before the advertisement.

* The plaintiffs, (the executors) knowing this ticket to be in the possession of the defendant *Herring*, brought an action of trover against him; and at the trial they were nonsuited, because the defendant having a transfer from *Smith*, the first proprietor, and counter-signed in the office, he had thereby a propriety, and no other person could have a legal right to it; for the statute by which these annuity tickets were created, or the fund for the same, expressly provides that every transfer of these tickets shall be filled up, and counter-signed at the office, and an entry kept of every assignment, or transfer, with the names of the parties contracting for the same. * P. 45. † 11 & 12 Annæ.

And it being a question at this trial, whether any evidence ought to be admitted of the right to this ticket, claimed by any person who had not complied with this statute, against the right of him who had complied, it was ruled by the court, that it ought not; and thereupon the plaintiffs were nonsuited.

Afterwards the executors exhibited a bill in the Exchequer, in which they set forth the death of the testator, the entry of this ticket in his books, and all the aforesaid matter, and that such tickets are constantly sold in *Exchange-alley* without endorsing any transfer,

transfer, but only the name of the first proprietor; and that such which have not transfers indorsed, sell better than those which have many such indorsements; and that it is the common practice never to make any indorsement over the first proprietor's name whilst these tickets are in agitation, nor until they come into the hands of such persons who intend to keep them; for if every transfer should be indorsed, the tickets would be so full of them, that they could be no longer transferrable.

Therefore it was insisted, that the not indorsing the transfer, should not in equity prejudice the plaintiffs, it being the constant method of assigning such tickets, not to indorse the transfer as aforesaid.

Econtra.

The defendant by his counsel insisted, that he purchased this ticket at a market-rate, and *bona fide* for a valuable consideration in *Exchange-alley*, without any covin or fraud; and that he had complied with the statute, and filled up an indorsement which was proved by one *Mackoy* a broker, of whom he bought this ticket; and therefore it was insisted, that this bill might be dismissed with costs, as having no equity against the defendant, and for that the plaintiffs had already been defeated at law.

* P. 46.

* It being objected against reading the depositions of *Mackoy*, for though he is a broker, and as such might be an evidence; yet it appears by his own deposition, that in this case he did not act as a broker, but sold the ticket in his own right; and because the defendant may have some demand against him, if the plaintiffs should prevail in this suit; therefore he ought not to be an evidence for the defendant, for that in consequence might be to discharge himself.

But the court was of opinion, that his depositions should be read, for tho' his evidence might not be admitted before a jury of freeholders, for the reason before-mentioned; yet this court are proper judges what stress or weight ought to be laid on it.

And after reading the answer, and *Mackoy's* evidence confirming it in every thing, the *Chief Baron* and *Baron Gilbert* were of opinion, that the bill ought to be dismissed; for that every purchaser of such tickets who keeps them open after the purchase, without filling them up with an endorsement and transfer according to the statute, keeps them at his own risque or peril; and if they come afterwards into the hands of a stranger *bona fide*, and for a valuable consideration, who gets a transfer endorsed as directed by the statute, he hath an absolute right to them both in law, and in equity; and *Baron Gilbert* held, that whatever the court might do, if the cause was open, and came before them without a trial at law; yet there could be no equity now to set aside the *non suit*, because that would be an admittance, that the defendant had a legal right.

The *Chief Baron* was likewise for dismissing the bill; it is true, if the testator *Devallar*, when he purchased this ticket, had procured

cured a transfer to himself, and thereby had a legal right to it; in such case, if after his death, the defendant had purchased it of a stranger, without acquainting his executors (the plaintiffs) therewith, they might have some equity on their side, because the name of their testator was indorsed on the ticket; and by that means the defendant might have been sure who was the owner of it, and who had the power to transfer it to him.

But as this case is, there could be no negligence in the purchaser, for he bought it for a valuable consideration, and had done every thing necessary to establish his right, and could not know that the plaintiffs testator had any right to this ticket, because there was no transfer indorsed to * him; therefore by keeping it open without * P. 47. any transfer, he kept it at his own risque for any man to fill up, who came to the possession honestly, and without fraud; so that this bill ought to be dismissed.

Baron Price differed in opinion, and argued from the hardship of the case; and that the defendant should have taken care when he bought this ticket, of whom he bought it, especially since *Mackoy*, the seller, had no transfer to himself, but only the bare possession; and since the name of *Smith*, the first proprietor, was indorsed, he might have been informed whose ticket it was he then bought.

That it was a hard case on both sides; it was hard for the plaintiffs (the executors) that they should lose their right, because they did not know it soon enough to advertise it; and it is hard for the defendant to lose the benefit of his purchase.

He put the case of a *promissory note*, which, if indorsed, and afterwards lost, and passed in way of trade to a third person, for a valuable consideration; yet the indorsee might bring an action of trover for the note against the third person, which the other Barons did not deny; thereupon it was proposed by *Baron Price*, that this ticket should be divided between the contending parties, but that was not agreed to; and at last the court took time farther to consider till next *Michaelmas* term.

Vernon versus Benson.

THIS was a case referred to the *attorney* and *solicitor* general by the King and counsel for their advice, whether it was reasonable for the King to revoke a *sign manual* and *privy signet* granted to *Sir John Fryar*, in trust for the defendant *Benson*, the same being obtained by surprise (as was suggested in the plaintiff's petition) and without a full and due information.

Sign manual not countersigned by the lord of the treasury, nor by a secretary of state, not good.

The case was thus: *J. Colonel Vernon*, father of the petitioner *Mary Vernon*, and great uncle of the other petitioner *Captain Vernon*, was a true *Royalist* in the civil wars, and sold his estate to raise a regiment for the service of the king, and afterwards served him in his exile.

* P. 48.

After the king was restored, he granted to the said *Colonel Vernon* certain lands in *Cloontarfe in Ireland*, now of the value of 700 *l. per annum*; and likewise, in consideration of his said services to the crown, and of his giving the King all * that land on which the fort of *Sheerness* then stood, and also of 7000 *l.* in money, the King by letters patent granted to him, and to *Rupert Brown*, the honour, manor, and forest of *Weedwood* in fee.

Now, before this grant made to *Colonel Vernon*, he was possessed of some of the offices in the said forest for a long term of years then to come, by virtue of a grant made thereof to the *Duke of Ormond and Earl of Chesterfield*, in trust for him, &c.

But the grant of this forest, as aforesaid, being apprehended by some persons at court to be very excessive, there was some intention to revoke it; but it not being done in the life-time of that King, his brother and successor, *King James the second*, having the like intention, a bill was exhibited against the said *Colonel Vernon* and *Rupert Brown*; and upon a full hearing of the cause before the *Lord Chancellor Jefferies*, assisted by the two Chief Justices and Chief Baron, it was decreed, that the said letters patent should be vacated, being obtained by a gross imposition on the King in the value of this forest, which are the very words of the decree.

Colonel Vernon intending to appeal to the house of Lords from this decree, soon afterwards died; and upon the accession of *King William* to the crown, it was thought not expedient to rest his right to this forest on this decree; therefore an act of parliament passed to vest this forest, and all the rights and members thereof in the crown, no body appearing in that sessions of parliament to claim any right the *Colonel* had therein, or to the leases he had in the said offices, or to the lands on which the *Fort of Sheerness* was built, the heirs and representatives of the said *Colonel* being all *roman catholicks*.

But *Rupert Brown* took care of himself, by obtaining in the said statute a saving of his right; and by a clause therein, (*viz.*) That he should be paid what debt was due to him from *Colonel Vernon*, by sale of some timber in the said forest, to be set out by such persons as the King should appoint; and that he should assign over such securities as he had from *Colonel Vernon*, to such person or persons as the King by his sign manual or privy seal should at any time appoint to recover the same.

And *Rupert Brown* being paid the debt due to him by the sale of timber, this debt, which was originally due from *Colonel Vernon*, remained in the crown.

* P. 49.

* Thereupon the late Queen granted a privy seal to one of her officers to recover this debt for her use; and the petitioner *Mary Vernon* having in like manner petitioned her Majesty as now, and that petition being referred to the Lords of her Majesty's council, they represented the petitioner to the Queen as an object of her charity.

But

But the Queen dying before any thing more was done pursuant to the said *privy seal*; this debt due from *Colonel Vernon* still remained in the crown by virtue of the statute aforesaid; and thereupon the defendant *Benson* obtained this *sign manual*, to *Sir John Fryar*, to recover this debt in trust for the said *Benson*; and likewise another *sign manual* reciting the first, and commanding *Rupert Brown* to deliver to *Sir John Fryar* all the securities he had from *Colonel Vernon*, and to assign them to *Sir John*, which was accordingly done by an assignment of a judgment of 3500*l.* in *Ireland*, which affected his estate in *Cloontarfe*, which judgment was revived; and the petitioner *Mary Vernon* sued to an *outlawry there*, and a *scire facias* was brought against *Captain Vernon*, the other petitioner, who was the next in remainder after an estate-tail in the petitioner *Mary*, by virtue of a settlement made by *Colonel Vernon*, (the said *Mary* being now above fifty years old, and without issue); thereupon this petition was exhibited, suggesting the matter above-mentioned, and that the King was surprised in the granting this *sign manual*, and not duly informed of the merits and services of *Colonel Vernon*, or of that equitable demand he might have of the crown, for the land on which the fort of *Sbeernefs* was built, or of those terms for years still subsisting of, and in those offices which he had in *Weedwood Forest*.

And this petition being referred to the *Attorney* and *Solicitor General* for their opinion, whether it was reasonable for the King to revoke this *sign manual* and *privy signet* to *Sir John Fryar*, as obtained by surprise, and without due information, as aforesaid.

It was argued in behalf of the petitioners, that it was a great hardship, that the heirs of *Colonel Vernon* should be deprived of those equitable demands they had on the crown, for the lands on which the fort of *Sbeernefs* was built, and of the right which they had to the leases for years in the offices in this forest, and to have no manner of satisfaction for the same, or for any part thereof; and that it is very probable, if the King had been informed of these * demands * at the time he granted this *sign manual*, he would not have granted it, so it is reasonable for him to revoke it, now he is fully apprised of the said demands. For the petitioners. P. 50.

Besides, this *sign manual* never passed thro' the offices as it ought to have done, for there is no copy thereof in the office of the *secretary of state*, or in the office of the *Lords of the Treasury*, and therefore not duly issued; and it would be of dangerous consequence, if the treasure of the crown could be disposed by a *sign manual*, without being counter-signed by the *Lords of the Treasury*, or some other officers, who are by the laws of the land to be a guard to the King, that he might not be imposed on by any of his subjects.

The counsel for the defendant insisted, that this *sign manual* was obtained without any fraud, and without any imposition on the crown, and that this debt was now vested in the King by act of parliament, without any reservation of the right of the petitioners; For the defendant.
and

and if they suffer any hardships, it is not by the defendant, but by the statute, who did not, nor could apprise the King of any right they had, as not knowing they had any; and that if they have any equitable demands on the crown, still they cannot have any right to this debt, because it is vested in the King by act of parliament, and therefore they may apply to him to be considered as his Majesty shall think fit.

Now, admitting the *sign manual* was not entered in the secretaries, or any other office, nor countersigned by the Lords of the treasury, or by a secretary of state; yet since it was fairly obtained, and since it was drawn by the under secretary to the Lord Sunderland, who was principal secretary of state, and by him sent to Sir Edward Northey, then Attorney General, for his opinion, and by him approved, and sent back to the secretary's office, and all this done before it was signed by the King; in such case, if the secretary hath been so remiss as not to enter a copy of it, his neglect shall not be prejudicial to the defendant, who had done all which he ought to do to obtain this *sign manual*.

* P. 51. Besides, the not countersigning it, doth not make it void, nor the not entring copies thereof in any of the said offices doth not make it ineffectual, because the countersigning or keeping copies thereof, serves to no other purpose than to apprise the King, if any other person should endeavour to obtain a sign manual for the same thing which hath been already * granted, or to serve as a *tally* to account with the King for his treasure; it adds no force to the sign manual; for in respect to the grantee, it is as good before it is *countersigned* as afterwards; for if it should be otherwise, then the secretaries of state, and the Lords of the treasury would have it in their power to render the King's grant ineffectual; therefore they are obliged to countersign the same.

Besides, there is a very good reason why this *sign manual* should not be countersigned, because this demand never was any of the King's treasure; for it is only a power or right to bring so much money into the treasury; for which the Lords of the treasury are not accountable till it is actually brought in; for which reasons it was insisted, that the King ought not to be advised to revoke this *sign manual*, tho' it was not *countersigned*, and tho' the Attorney General told the counsel for the defendant, that he never saw any sign manual before this, but what was *countersigned*.

The reply of
the petition-
ers.

The counsel for the petitioners replied, that it was absolutely necessary all *signs manual* should be *countersigned* either by the Lords of the treasury, or by a secretary of state; otherwise great inconveniencies might happen both to the King and people; for the King might be abused into extravagant, nay, into different grants of the same thing to several persons; and it is for that reason the law appoints he should be guarded by such counsel as would obstrust such grants; for if they should be good without passing thro' the usual offices,

offices, and without observing those usual ceremonies, it would be a vain thing to keep such offices as a fence to the crown from any impositions.

And tho' it hath been said on the other side, and it may be true, that the *counter signing* adds no strength to such grants, and that they are good in respect to the grantee, tho' not countersigned; and that it would be very inconvenient if the neglect of the King's officers should be prejudicial to the defendant; yet the *counter signing* is a necessary ceremony to be used in all the King's grants, to make them effectual in passing any interest to the grantee, and a condition without which they cannot pass any treasure out of the crown.

Now if *counter signing* is necessary, it would be a greater inconvenience to the publick, if such grants should be good without being countersigned, than that the neglect of the officer should avoid a sign manual, for not countersigning it, because it is the business of the grantee to see that the officer should do his duty in perfecting and finishing the grant; * but if such naked grants (as this) should be good to pass the King's treasure, then those offices and officers are of no use. * P. 52.

On another day the counsel for the defendant argued, that this was a good *sign manual*, and effectual to pass the King's right to this debt; for tho' it might not be good to pass the King's treasure; yet in this case it is no more than an appointment according to the statute to recover a debt, and doth not rest on the foot of other *signs manual*, but receives its strength from an act of parliament, by which the right to it is vested in the crown. For the defendant.

This was granted by a *sign manual* of the late Queen, and then, as now, the said *Mary Vernon* petitioned the Queen to revoke it; and that petition was referred to the Lords of the then council, who represented the petitioner as an object of her Majesty's compassion, which in effect was giving up her right, and she may still be an object of compassion, but that cannot be a reason to revoke a *sign manual* fairly obtained; and to complain of any hardships, is to impeach the statute, which ought not to be done, because it is not to be imagined that the parliament would deprive any person of a just right without making some other recompence; and it may reasonably be presumed, that the petitioner had no right, for if she had, that had been the proper time to claim it before the act passed.

But the truth is, she had no right; for the parliament considering how many years *Colonel Vernon* was in possession of this *forest*, and had received the profits thereof, might apprehend that to be a good consideration for his land on which the *fort of Sbeerness* was built, and of other demands he could have; and therefore there was no saving of any right in the statute as to him.

Now as to the *counter signing this sign manual*, admitting it to be necessary; yet if other things were done, which amount to a countersigning, these shall make it as effectual as if it was countersigned;

now this *fgn manual* was sealed with the *privy signet*, which is always kept in the *secretary's office*, and this is a good proof, that it passed thro' the usual offices, and was fairly obtained, and a better proof than if it had been countersigned by the secretary himself.

* P. 53. Besides, about two years after the granting the first *sign manual*, the defendant obtained another, commanding *Rupert Brown* to deliver up *Colonel Vernon's* securities to *Sir John Fryar*, which last *sign manual* was countersigned by the * secretary of state; and a copy thereof is kept in his office, which plainly shews that it was not obtained by any surprise or misinformation.

For the petitioners.

The counsel for the petitioners argued, that though the first *sign manual* was recited in the second, yet that would not make the first good; for it was never yet heard that the recital of a void act in the King's grant should make it better; but on the contrary, if the second depends on the first, it avoids both, whether the grant is made by the king, or a subject.

That this *sign manual* being sealed by the privy seal, doth not amount to a countersigning, as was alledged on the other side; for the true reason of *countersigning* is not to shew that the grant passed through such an office, but to shew what was done by the minister of state, for, or in behalf of the King to whom he is accountable, for his advice and conduct in the office.

Now there being two secretaries of state, and a privy signet kept in each of their offices, the sealing the King's grants with the privy seal, doth not inform the King, or the subject, which of those secretaries passed the grant as countersigning doth; or if it did, it is not so effectual as countersigning is, to bring a publick minister to account for his misconduct in passing such grants which ought not to be passed, because countersigning is an approbation of the grant, and an implied consent and advice of the minister to pass it.

As to what was said, that this *sign manual* doth not rest on the foot of others, because it is but an appointment according to the statute to recover a debt, certainly this must be wrong; for though the statute impowers the King to assign this demand, it must be intended by a good and effectual *sign manual*, and not by one which is informal or void.

And as to the representation of the late Queen's council of the petitioner to be an object of her compassion, which is now said to be a giving up the right of the petitioners; it is very true, that since the statute, the petitioners have no remedial right; neither do they insist in their petition, that they have any right, but set forth what services *Colonel Vernon* had done for the crown, and what reasons might induce his Majesty to extend his royal bounty to them who are his heirs; and that this debt being now vested in the crown, they deserve to have it released more than any other person can deserve to have it granted.

* It is true, the representation of these services, and the hardships * P. 54.
suffered are foreign to the merits of the reference now depending, but
requisite to induce the King to grant this reference; therefore the
petitioners did not now rely on those services, but would leave them
to the consideration of the King in council; and at this reference
they rely, that this is a naked and informal sign manual without any
precedent, and not sufficient to pass the King's treasure, and conse-
quently ought to be revoked, if it is his Majesty's pleasure so to do.

At this reference the attorney general said, that he never saw any ^{Nota.}
sign manual, but what was countersigned by the secretary of state,
or the Lords of the treasury, but had seen several not sealed with *the*
signet or privy seal; that he had observed this difference, (*viz.*)
That where the *sign manual* was only a direction or commission to
do a farther act, as to make out *letters patent*, there it is only coun-
tersigned, but not sealed; but where it is to be the principal act it-
self, there it is both *sealed and countersigned*.

Then one of the counsel for the petitioners said, that *King Wil-*
liam had granted a sign manual to the now defendant, who carried
it to the secretary's office, when *Mr. Vernon* was secretary of state,
in order to have it countersigned and sealed, which he refused to do,
and would not return the sign manual, but kept it; and upon com-
plaint made to the King, he was attended by that secretary, who
shewed reasons for his so doing, and the King was satisfied with the
suppressing it.

After the death of that King, a bill was exhibited in Chancery
by the now defendant against *secretary Vernon*, suggesting that he
the complainant had obtained such a sign manual, which would
have been very beneficial to him; but that it was unjustly suppressed
by the defendant *secretary Vernon*, and upon hearing the cause, that
court approved what the secretary had done, and the plaintiff's bill
was dismissed.

Sir Lawrence Anderton, Baronet, *versus* commission-
ers of the forfeited estates.

UPON an appeal from the decree of the commissioners, &c. Whether a
to the delegates, the case appeared to be thus, (*viz.*) *Sir Law-* Monk pro-
rence Anderton being the eldest son of his father went to *Doway*, fessed is capa-
and there became a *Monk*; thereupon *Francis*, * the next brother ble of taking
of *Sir Lawrence*, assumed the title, and possessed himself of the an estate.
estate of the family, but being concerned in a rebellion, and taken * P. 55.
prisoner at *Preston* in *Lancashire*, he was tried and found guilty of
high treason; and being pardoned as to his life, the commissioners
seised the estate; and thereupon *Sir Lawrence* (the Monk) claimed
it, insisting before the commissioners, that his brother *Francis* had
no right.

The

The commissioners having examined *Sir Lawrence* upon oath, by virtue of a power given them by that statute, which vests the forfeited estates in the King; and upon his said Examination, he having confessed he was a *Monk*, they decreed for the crown, for that by the appellant's *profession* he was dead in law, and by consequence incapable to take; and therefore the estate must immediately vest in his brother *Francis*, who being attainted of treason, the estate must be forfeited: and thereupon, by the opinion of four of the commissioners against three, a decree was made for the King.

From which decree *Sir Lawrence Anderton* appealed to the delegates, who were *Justice Powys*, *Justice Tracy*, *Justice Fortescue*, *Baron Mountague* and *Baron Page*; and the case was argued at *Serjeants-inn-hall* in *Fleet-street*, by *Sir Philip York*, *Solicitor General*, in behalf of the appellant, and by *Sir Robert Raymond*, *Attorney General*, for and in behalf of the commissioners.

For the appellant *Sir Lawrence Anderton*.

The counsel for the appellant insisted, that there were two reasons which might induce the court to reverse this decree: first, for that it doth not appear that the appellant is a *Monk professed*; for tho' upon his examination he confessed he was a *Monk*, yet he may be a *Monk*, and not a *Monk professed*; but if he was (which is not proved in this case) yet he is capable of taking this estate; for though at common law, a *Monk professed* was dead in law, and by consequence incapable of taking an estate; yet since such disability did arise by some canons of the popish church (which was the ruling church at that time) and those canons being now abolished by act of parliament; and there is no means left to try, whether a man is a *Monk professed*, or not; therefore such *profession* shall work no incapacity in any man to take and enjoy an estate; so that if it could be proved, that the appellant was a *Monk professed*, yet this decree ought to be reversed.

Econtra.

* P. 56.

On the other side it was argued for the respondents, that the appellant being taken into and living in a *convent* in foreign * parts, there could be no possible means of proving him a *Monk*, but by his own confession; and he having upon his examination confessed himself to be a *Monk*, it must necessarily follow he is *professed*, because he is not a *Monk* till *profession*.

And as a *Monk professed* was by the common law of *England* made incapable of taking or enjoying an estate, because he was accounted dead in law; so it was not by the canons alone of the popish church, but even by the common law of this nation, that such incapacity did arise; therefore the same disability still remains, unless it can be shewed that there is some statute which enables a *Monk professed* to take and enjoy an estate, which they do not on the other side pretend to shew.

For the appellant.

The solicitor general replied, that, if to say a man is a *Monk*, must imply, that he is a *Monk professed*, then the constant addition of that word in our law-books would be impertinent, which it is not, for

for it is always used to shew the difference between a *Monk* and a *Monk professed*.

But admitting the appellant is a *Monk professed*, yet the law, as now established, doth not take any notice of such *profession*; and if it was a disability, it is not so now, because there is *no method of trying, whether a Man is a Monk professed, or not*, for the trial at common law was by the *certificate of the bishop*; but as the law now stands, no bishop can certify a profession of being a *Monk*; therefore it would be a very hard great hardship if this should work an incapacity, when there is no means of trying it; and if it cannot be tried, then it is plain that the law doth not take any manner of notice of it.

The decree was reversed by the opinion of the other four against *Mountague*, so far as to order, that the appellant might bring an ejectment against the commissioners, and try his title at law; and that the decree should not stand in his way.

But in a little time afterwards *Sir Lawrence* took the oaths, and received the communion according to the church of *England*, and became a protestant, and so enjoyed his estate without any farther trial.

Halfpenny *versus* Udale. (Ex relatione magistri Buckley.)

BY a marriage settlement lands were conveyed to the *Baron pur vie*, to the *feme pur vie*, to trustees to preserve contingent remainders, remainder to the first and every other son in tail, remainder to *A. and B.* for 500 years to raise younger childrens portions, &c. whereas the term for 500 years ought to have been created precedent to the limitation in tail to the first son. The first son, when he came of age, by a recovery cut off the term for years, to be relieved against which recovery, and that some provision may be made for the younger children, a bill was exhibited in *Chancery*.
“*Sir Joseph Jekyll*, Master of the Rolls, upon hearing the cause, made a decree accordingly; for it plainly appears to be the intent of the parties that the younger children should be provided for, which this court ought to assist.

Chancery will assist provision for younger children.

* P. 57.

* D E

Term. Sanct. Mich.

10 Georgii. In Cancellaria.

Newland *versus* Sheppard.

A freeman of London having one daughter, and several grandchildren by her, devised his personal estate to pay debts and legacies; and afterwards what remained, to be sold, and the money arising by sale, (viz.)

The interest to be paid to his grandchildren, share and share alike till of age, but did not dispose the principal sum; and now his daughter, who was heir at law, and her husband, exhibit a bill to have the principal. 2 Wil. Rep. 194. pl. 50.

THE plaintiff married the daughter and heir of *Sheppard*, a freeman of London, by whom he had issue one son and several daughters, which said freeman, by his last will, devised his freehold lands to the defendant his wife, for life, remainder to his grandson (who was the son of the plaintiff) for life, remainder in tail to his first son, &c. with like remainders to his granddaughters, according to their seniority, and not as *coparceners*; and as for his personal estate, he devised, that after his debts and legacies were paid, the residue should be placed out at interest, and that the said interest should be paid to his said grandchildren, share and share alike, until they were of the age of twenty-one years, but did not dispose of the principal.

And now the plaintiff exhibited his bill to have 2000*l.* part of the portion of his wife, which was unpaid at the time of the death of her father, the said testator, with interest for the same in nature of a creditor, and for an account of his personal estate, which by the custom of London did belong to his (the plaintiff's) wife, as only child to the testator, her father, who had made no disposition thereof.

* P. 58.

* The defendant, the widow, owned in her answer, that the testator was a freeman of London, but insisted that the plaintiff's wife was advanced in his life-time, and so is not entitled to any part of his personal estate, unless she puts her share in *botchpot*, and she submits to pay the 2000*l.* but without interest, and insists on the devise of the real estate to her for life, &c.

And on reading the proofs it appeared, that the portion of the plaintiff's wife carried interest from the day of her marriage, tho' part of it was not payable in several years after.

Where-

Whereupon it was decreed, that the said 2000 *l.* with interest, should be paid, and that an account be taken by the Master, what the testator died worth, and then the court would consider what was to be done with the principal money not disposed; but declared, that it would be a hard construction of this will, that the grandchildren should have the interest thereof during their minority, and no share of it when they came of age.

And as to the measure of the account to be taken by the Master, it being insisted, that it should be according to the computation of the value of the personal estate at the time of the death of the testator, and not as lessened by any accident; the court declared, that if the estate had increased in the hands of the executor, the plaintiff would have expected the benefit of such increase; and it is but equitable that he should be contented with the loss; but that being occasioned by the *South-sea* company, the act of indemnity discharges all trustees and executors: and as to the principal sum undisposed, the court took time to consider of it, in respect to the children, till the Master had made his Report.

Ashton versus Bretland.

THE plaintiff exhibited a bill against the defendant to be quieted in the possession of certain lands, which he held by lease under the defendant, who had brought an ejectment, and endeavoured to turn him (the plaintiff) out: the case was as followeth:

Bill to be relieved against a covenant in a lease, as not drawn pursuant to the covenants in an old lease.

Serjeant Bretland granted a lease of these lands to one *Ashton* for ninety-nine years, if three lives (naming them) or any of them should so long live, which lease was granted upon a surrender of an old lease of the same lands to the *serjeant*, * and was to be pursuant to the covenants in the old lease, one of which was, that it was mutually covenanted, that upon the death of any of the three lives, the lessee should surrender the old lease, if it was his will so to do; and thereupon the *serjeant* covenanted, that upon such surrender and payment of an heriot, and eight pounds, he would grant a new lease for three lives, &c.

* P. 59.

Now in this new lease, the covenant was drawn, that *Ashton*, on the death of any of the three lives, would absolutely surrender the same, and pay an heriot and eight pounds; and one of the lives being now dead, and the plaintiff refusing to surrender this lease, and renew it upon payment of the said heriot and fine, the defendant brought an ejectment, and the plaintiff exhibited this bill, and got an injunction, the end of which bill was to be relieved against the covenant in the new lease, and that for two reasons.

First, because *serjeant Bretland* had so settled his estate, that the new defendant was only tenant for life, and by consequence, if he should surrender the lease, the defendant had no power to grant a

new

new lease for three lives; so that since the plaintiff cannot have the benefit of the covenant for his advantage, it is not reasonable that he should be obliged to the performance of that part of the same covenant to his disadvantage; and that the defendant should be at liberty to take any advantage of a disability occasioned by his being *made tenant for life*.

2. It was suggested in the bill, and likewise proved, that this new lease differed from the old lease, which was to be the rule of the new one; for that it was drawn by the serjeant himself with a covenant, that the lessee should absolutely surrender the same upon the death of any of the lives, and to pay an heriot, and 8 l. when the old lease was to surrender, *if it was his will so to do*, which is not obligatory, but left to his discretion; but by the new lease he is bound to surrender, and renew, and pay an heriot and fine upon the death of every life.

All which appearing on proofs, the *Lord Chancellor* decreed, that since the plaintiff was a purchaser of this lease (as every lessee is) the subsequent settlement made by the *serjeant*, by which the defendant is made *tenant for life*, shall not prejudice him (the plaintiff) nor forejudge him of the benefit of any covenant in his lease; so as to that point, there is no reason to excuse the plaintiff for non-performance of the covenant on his part, because the defendant * is to all intents capable to perform that covenant on his part.

* P. 60.

But as to the second point it is clear, that the *serjeant* himself (who drew the new lease) did draw it in a different manner from the old one, which should have been the standard to guide him, and that it was drawn for his own advantage, but in equity it shall be taken as if it had squared with the old lease; so that if the lessee is not willing to renew, he shall be quieted in his possession under the new lease, as if he held by the old lease.

Mead *versus* Caswell.

A goldsmith's note was given in part of payment of money on a *saturday*, and not offered to the drawer till *monday* following; this is no new credit given to the drawer, but that the indorser is still liable.

THIS was a bill brought by the plaintiff to be relieved against a verdict and judgment at law, in which the case upon the pleadings was thus, *ff.*

The plaintiff *anno* 1720. gave a note drawn by *Cox and Cleve* goldsmiths, for 1758 l. to the defendant in part of payment of money due to him (the defendant) from the plaintiff.

That it is a custom amongst the *goldsmiths in London*, to balance their accounts every day, but especially on every *saturday*, when they clear up the accounts of the whole week.

That this note was delivered to the defendant on a *saturday* about eleven of the clock in the morning, and he might have received the money that very day of the goldsmiths; but he did not offer the note to them till the next *monday*, and then about ten in the morning

ing he offered it, *which the cashier cancelled*; and the servant might have received the money (as the plaintiff suggested) if he had staid, for that the goldsmiths *Cox and Cleve* had paid above 20000 *l.* that morning, but the servant went away; so that it was thro' the defendant's negligence the money was not paid, and that his delay from eleven a clock on *saturday*, till five in the afternoon on the *monday* following, was a *new credit* given by him to those goldsmiths; and for that reason, he (the plaintiff) insists, that the defendant shall not have recourse to him (the plaintiff,) and the rather, because his note was cancelled by the cashier, who gave another note of the same date, and for the like sum at five of the clock in the afternoon of that *monday*; but it was after those goldsmiths were become *bankrupts*; upon which note the verdict, and judgment was had; and the plaintiff * insists, that he cannot by virtue of such note be accounted by * P. 61. the commissioners of bankrupts to be a creditor to these goldsmiths within any of the statutes of bankruptcy, though this note bears even date with the original note so cancelled; for that the time of making it is the true date, which was after they were bankrupts.

On the other side it was confessed, that this note was received by the defendant on a *saturday*, and that the custom amongst *goldsmiths in London* is as suggested by the plaintiff; but that it is likewise the custom amongst them, for one servant to go every day to offer all the notes passed to his master that day to them who drew such notes, and to receive the money; and when he returns home to make a separate entry of all which he received, and then to pay it over to the cashier.

That on that very *saturday*, the defendant had received several goldsmiths notes as payment, and which were drawn by them who lived at *Charing-cross*, *Covent-garden* and *in the Strand*, which notes he sent by his servant on that very day to the several goldsmiths who drew the same in that part of the town, and his said servant did on that *saturday* receive of those goldsmiths 12000 *l.* for his (the defendant's) use, in his way of trade.

That it is likewise a custom amongst goldsmiths not to pay any money after five of the clock in the afternoon, but to employ the rest of the day in adjusting their accounts, and that his servant returned from that end of the town on that *saturday* about half an hour after four, and began to enter in his books all the sums he had then received; but before he could make an end, the hour was past for payment of money amongst merchants, which was the reason he did not offer this note on *saturday* to the goldsmiths who drew it.

That on the next *monday* morning, he sent his servant with the note to the drawer, and gave him no order to stay, only to demand payment of the money; but that he accordingly offered the note to the drawer, which the cashier cancelled, and desired the servant to call in half an hour, for that *Cox and Cleve* were gone to the *Bank* to receive money.

* P. 62. Thereupon the servant went away, and returned within half an hour, and not receiving the money at that time, he called twice more at the shop, and not receiving any, he returned to his master (the defendant) and told him that the * goldsmiths could not pay it; whereupon the defendant went to their house, and finding the note cancelled, he had no remedy, but procured a new note of the same date with the original note, and for the same sum; on which he obtained a verdict and judgment, and insisted, that the note is no payment of the money, unless the defendant had given the goldsmiths some new credit, which he denied that he had given; and therefore insisted to have this bill dismissed with costs, and to be at liberty to take out execution on his judgment.

Curia.

The court decreed, that though it appears there was some negligence in the defendant's servant, in not staying to receive the money on *monday* morning, when the cashier cancelled the note in his presence, yet it would be hard to make the defendant suffer thereby; therefore the court dismissed the bill with costs.

Alison's case.

The mother gave a bond to her son conditioned to surrender a copyhold estate to him, of which she was heir; decreed that she was a trustee for her son.

THE plaintiff exhibited a bill against her niece for a moiety of a copyhold estate, which she claimed in *coparcenary* with her said niece, by descent from *T. A.* her brother; the case was thus: *ff.* One *Alison* the plaintiff's uncle was seised of the inheritance of a considerable copyhold estate, and having no issue, intended to leave it to his nephew *T. A.* the plaintiff's brother; but being taken ill, he had no time to surrender to the use of his will, and for want thereof, the estate would descend to his sister, who was his heir at law, and mother of the plaintiff; and to prevent such descent, the said *Alison* procured his said sister to enter into a bond of 2000 *l.* to the said *T. A.* her son, conditioned that at any time upon his request, she would convey the said copyhold lands to him and his heirs.

Pursuant to this agreement, *T. A.* entered after his uncle's death, but without any conveyance from his mother, and sometime afterwards he died without issue, but had *two* sisters; one of them entered and surrendered to the use of her will, and devised this estate to her granddaughter, and died; and now the surviving sister exhibited this bill to have a moiety of the estate in *coparcenary* with her niece, as heir to her brother *T. A.* deceased.

* P. 63.

The counsel for the plaintiff insisted, that upon the foot of the agreement with her uncle *Alison*, and the bond of 2000 *l.* which his sister gave to surrender at any time when *T. A.* her son should require it, that she shall be deemed as a trustee for her son, especially since she had carried the agreement into execution, by permitting him to possess the land during her life, tho' she was heir at law to her brother *Alison*.

And.

And this is a stronger case, than that where the father being about to make his will, and intending to make an executrix, his son said, that if he (the father) would appoint him (the son) to be executor, it would give him some countenance in the world; and that if his father would do so, he (the son) would be only a nominal executor, and that his mother should have the benefit of it; whereupon he was made executor; but after the death of his father he insisted on the benefit of the executorship; which was set aside by the decree of this court made by the Lord Chancellor *Cowper*, upon proof of this promise, tho' there was nothing in writing.

A promise, tho' not in writing, was decreed to be made good. *Thynne of Egham's case*, 1 Vernon, 296.

2. Lord Keeper North.

And in the principal case the Lord Chancellor decreed, that the mother was a trustee for her son, and therefore that the defendant should surrender to the use of the plaintiff, and both of them to be admitted as *coparceners*.

Waller versus King.

THIS was a bill brought against the defendant to set aside an award, and also a judgment and execution got on a bond, and a warrant of attorney extorted from the plaintiff *Waller* by duress, and to have restitution of the money levied by sale of goods taken in execution; in which the case was:

A hard award not set aside, tho' made without the knowledge of one of the parties.

¶ The plaintiff *Waller* was arrested at the suit of the defendant, and thereupon both parties submitted all differences between them to two arbitrators, and that if they could not agree in an award, then to an umpire; and the arbitrators not agreeing, the umpire awarded 36*l.* to be paid by the plaintiff to the defendant, without hearing the plaintiff; thereupon an action of debt was brought against him for non-performance of the award; and being under an arrest, a bond was extorted from him, and a warrant of attorney thereon to confess judgment, which was entered and * execution taken out, and goods were levied to the value of 40*l.* all which the plaintiff prayed might be set aside.

* P. 64.

The defendant in his answer set forth, that he held lands by lease under the plaintiff; and that being indebted to several persons, the plaintiff (his lessor) perswaded him (the defendant) to make over his goods, and to deliver up his lease to him (the plaintiff) on purpose to protect the same against his creditors, which was done accordingly; but that the plaintiff abused the trust, and insisted, that the goods were his own, by an absolute surrender made thereof by the defendant; and this being the greatest cause of difference between them, it was referred to arbitration; and all this matter appearing to the arbitrators in the presence of the umpire, he made the award, &c.

The counsel for the plaintiff argued, that the award ought to be set aside, because it was made without the privity of the plaintiff, and

and therefore he could make no defence against it; and that it was a very unreasonable award, because it appeared upon the proofs, that the plaintiff had goods of the defendant, to the value only of 7*l.* 10*s.* and no more, and yet he was awarded to pay 36*l.* which is a very hard award.

Curia.

The court would not set aside the award upon account of any hardship therein, because the arbitrators were judges of the party's own chusing, and the plaintiff had notice, and might have been heard if he pleased; therefore it was decreed, that the bill should stand dismissed, with costs.

Wright *versus* Hobert.

UPON an appeal from a decree of commissioners of charitable uses; the case was:

Decree of the
commission-
ers of charita-
ble uses rever-
sed.

* P. 65.

¶ A certain piece of land called the *Lizard*, in the parish of *Wimmerton*, containing about forty acres of pasture, was formerly the inheritance of two persons, who several hundred years past conveyed the same to trustees, and their heirs, to the use of themselves, and the survivor of them, for life; and after their decease, to the intent that as many of the inhabitants of that village, as were able to buy three cows, might put them there to graze in the day-time, from the first monday in *May* to the first day of *August*, for ever; and from that day to be in common for all the inhabitants * there till *Lady-day* following, and then to be inclosed for raising the graze till the first monday in *May* for ever.

But this grant not appearing before the commissioners, it was pretended that the lands were given to the poor of that parish; and that about one hundred years past, the town, and the church where this grant was kept, was burnt; and so the evidence, that it was given to the poor, was destroyed by fire.

Whereupon the commissioners decreed, that *Sir John Hobert*, who was lord of the manor, should make a feoffment of these lands, to the use of himself and others, and their heirs, in trust, to put out some of the poor boys of that parish every year to some trades.

From which decree the plaintiff appealed, and objected against it, that there was no proof before the commissioners, that this land was given to the use of the poor of that parish; so that they had no power to make such a decree.

And now, upon producing the original grant before the commissioners (which was not burnt, as it was suggested) it appeared to be as above-mentioned, by which no manner of difference was made by the grantors between the rich and the poor inhabitants of that village.

The court was not satisfied why this original grant was not produced before the commissioners, but saw no colour to judge that these

these lands were given to the use of the poor, for that by the grant itself the contrary appeared; and it was proved, that the usage had been according to the grant for sixty years past; therefore there being no proof that this was given to the poor, exclusive of the rest of the inhabitants, the commissioners had no authority to make such a decree, for which reason it ought to be reversed.

And it was decreed, that every inhabitant who had three cows, should put them to graze on these lands, &c. as in the original grant, &c.

That if this manner of grazing had been by prescription or usage, no person but the inhabitants of antient messuages could be entitled to it; but it is otherwise appointed by the grant of the donors; and that there is no colour of costs against the commissioners, who contested nothing in their own right; not but that the court would have punished them, if it had appeared they intended to oppress.

* Anonymus.

* P. 66.

THE case, *ff.* The testator, who lived in *Holland*, and who was seised of a real estate there, and of a considerable personal estate in *England*, devised all his real estate to the plaintiff, and all his personal estate to the defendant, whom he made executor, and died.

Exemplification of a sentence given in a foreign nation shall be read as evidence here, that such sentence was given there without any farther proof.

But at the time of his death he owed some debts by specialties, and some by simple contract in *Holland*, and had no assets there to satisfy those debts, other than by his real estate, which, by the custom and laws of *Holland* is made liable to the payment of debts upon simple contract as well as upon specialties, if there are not personal assets to answer the same, especially debts upon simple contract for servants wages, or for work done.

Now the creditors in *Holland* sued the plaintiff there, to whom the real estate was devised, and had a sentence against it, by virtue whereof it was sold for the payment of their respective debts.

Thereupon the plaintiff exhibited this bill against the defendant, who was executor, and to whom the personal estate was devised, as aforesaid, that he (the plaintiff) might be re-imburshed by the defendant for the loss he had sustained in not bringing the personal estate to *Holland* to discharge the debts there in aid of the real estate.

The personal estate must come in aid of the real.

Upon hearing this cause, the plaintiff produced an exemplification of the sentence in *Holland*, under the common seal of the *States*, in evidence, without any farther proof, that such sentence was given there, for which reason the counsel for the defendant objected against the reading it; and this upon the authority of the case of *Swinerton* versus *Goddard*, in the house of Lords, where it was settled, that the exemplification of any judgment or sentence in any court, where the proceedings were by different laws from the laws of *England*, should not be given in evidence without farther proof.

Swinerton v.
Goddard.

* P. 67.

That case was as followeth, (*viz.*) *Swinerton* being a *Scotsman*, and here in *England* became indebted to *Mr. Goddard*, who obtained a judgment in the court of King's Bench against him; thereupon *Swinerton* retired to *Scotland*, where he had some effects; and *Mr. Goddard* got an exemplification * of his judgment here, which he produced in evidence before the *Lords of the session in Scotland*, upon a sult he brought there against *Swinerton*; but that court would not admit it to be read without farther proof, but gave sentence against *Mr. Goddard*; who thereupon appealed to the house of Lords here, and the sentence of the Lords of the sessions was affirmed; and in the affirmance of that sentence, a parallel case was cited, where in an appeal from *Ireland*, for that the *Lord Chancellor* there had founded his decree on the exemplification of a sentence given by the *Lords of the sessions in Scotland*, without any farther proof, that decree was reversed in the house of Lords here, for that, and for no other reason.

Econtra.

On the other side it was insisted, that judgments are transferrable by exemplifications from one court to another, and this is seen by daily experience where judgments in the civil law courts, as in the Admiralty, are transferrable to other courts, &c.

Curia.

The principal case differs from that of *Swinerton and Goddard*; for the plaintiff doth not make the exemplification of the sentence in *Holland*, the ground of his demand, farther than to shew, that there was a sentence there, for he must give the will and other proofs in evidence to make out his right, and then to shew how he was damnified.

The plaintiff complains of a sentence given in *Holland*, and certainly he must be allowed to prove, that there was such a sentence, and this is done by the exemplification of it, and he doth not found any demand here upon the sentence itself; but it is only to shew the court that he suffered there, and he must give other proof to shew, that it was occasioned by the defendant, and in what manner; for that is the ground of the complaint in this court, and not any wrong by the sentence itself.

Now by the laws of *Holland*, all debts shall affect the real estate there, but it is there, as it is here, that the personal estate shall come in aid of the real estate, and be charged in the first place; therefore the personal estate in this case should answer the loss, the plaintiff sustained by the sale of the real estate, tho' that happened in a different dominion.

See Brook
Custom 43.

Therefore it was decreed, that the plaintiff should be reimbursed.

Acherley

* Acherley versus Vernon.

S. C. 10. Mod. 518. Com. 381.

* P. 68.

189. Com. 513.

THIS was a bill exhibited by Roger Acherley, Esq; and his wife, and Lætitia their daughter, the wife being sister and heir at law to Thomas Vernon, Esq; deceased.

Where a will shall not be revoked by a codicil.

The bill sets forth, that Thomas Vernon was seised in tail of some lands, and of other lands for life; and was possessed of a personal estate to the value of eighty thousand pounds at the time of his death; and being so seised and possessed, he made his last will Anno 1711. and thereby, after some legacies given to particular persons, he devised all his real and personal estate to four trustees (naming them) in trust, that they should permit the defendant Bowater Vernon to receive the profits of his real estate for life, remainder to his first son in tail, &c. and that the said trustees should lay out his personal estate in a purchase of lands, which when purchased, should be settled to the same uses, &c. and he devised to his sister (the now plaintiff) Mrs. Acherley 200 l. per ann. during her life; and a little before his death Anno 1720. he made a codicil, and thereby confirmed his will, except such part as was by the said codicil revoked, and then he revoked that part of his will, wherein Mr. Acherley (the now plaintiff) and one Mr. Vernon were made trustees, and appointed Mr. Keck and Mr. Nicholls to be his trustees; and devised to his niece Lætitia Acherley 6000 l. and declared, that the same, and the annuity of 200 l. per ann. which by his will, he had devised to his sister for life, should be in lieu of all demands, they or either of them might claim of, or unto all or any part of his real or personal estate; and upon condition they should release to his said trustees all their right thereunto, and all the rest of his lands which he purchased since the making his will, and all other his real estate he devised to his said trustees to be settled according as in the will.

Where by a devise of lands, the fee farm rents will pass: and where by a devise of all his real estate copyholds will pass.

10 Mod. 518. Com. Rep. 513. pl. 214. 522 pl. Fortesc. Rep. 189. Wil. Rep. 783. pl. 230.

The plaintiffs by their said bill insisted, that by this codicil, the testator had revoked a great part of his will, and had made no other disposition of what he had revoked, and consequently that the same ought to descend to the said Mrs. Acherley as his heir at law; and that having purchased some fee-farm rents, issuing out of the manor of Hanbury; and having entered into articles for the purchase of several lands lying in the counties of Worcester, Warwick, * and Leicester, since the making his said will, the said rents and the lands which rested in articles, would not pass by the devise of all the rest of his lands, &c. in the codicil; and therefore must likewise descend.

* P. 69.

And that the said testator had some valuable manuscripts of cases decreed in the court of Chancery whilst he attended that court, which the plaintiffs now claim as their right, in order to have them published in the best manner, as a monument of his great learning

The defend-
ant's answer.

to be transmitted to posterity, and that it is a right vested in them before any other person whatsoever, being his heirs at law; and therefore shall descend to them in nature of *heir looms*.

The defendant *Bowater Vernon* by his answer confesses the will, and that after the making thereof, the testator bought several lands, and entered into *articles* for the purchase of more, and that part of the purchase-money was paid; and having increased his personal estate, he made a *codicil* as set forth in the bill; but insisted, that so much of his estate as rested in *articles* shall pass in equity by the *devise of all his new purchased lands in the codicil*; and so shall the *see-farm* rents, issuing out of the manor of *Hanbury*; for that they were afterwards merged in the purchase of that very manor by the testator himself, who at the time of his death, and long before, was Lord thereof.

And farther insists, that by the *codicil* none of the devises in the will are revoked, but rather confirmed; but if it should be a revocation of what was devised by the will, yet the lands shall pass by that clause in the last part of his *codicil*, where he devised *all the rest of his lands, &c.* to his trustees, &c. so that he left no part of his estate, either real or personal undisposed.

And as for the manuscripts, he submits to the opinion of the court, whether the trustees should have the publishing them, to to whom the testator had entrusted the rest of his real and personal estate.

The other defendant *Mrs. Vernon*, the widow of the testator, by her answer says, that he left her an annuity or rent-charge of 1000 *l.* *per annum*, during her life, besides what lands were about his house at *Hanbury*, whilst she lived therein nine months in every year; and the household goods and furniture of his house in *London*, which she insists to have secured to her as the court shall think fit.

* P. 70.

* She likewise claims 200 *l.* which was left to her by her father *Sir Anthony Keck*, to be laid out in what she thought fit in remembrance of him, which 200 *l.* she believes was received by the testator; and therefore insists to have it satisfied out of his personal estate.

And as for the *manuscripts*, she claims them as part of the testator's household goods, devised to her for her life, so that she insists on her right to them, that they may be published for the credit of the testator, and not that she claims the least benefit by them.

There was a cross bill exhibited against the plaintiffs in the original bill, which charges, that *Mr. Acherley* and his wife have received the annuity of 200 *l.* *per ann.* devised to the wife on the condition mentioned in the *codicil*, so that they are thereby concluded from any farther demand of the testator's estate, but shall be obliged to perform the condition and release, as therein is directed.

And farther, that the legacy of 6000 *l.* devised to the plaintiff *Latitia*, is ready to be paid on the condition aforesaid; and there-

fore that she ought to determine her election, whether she will accept the legacy upon the said condition, or renounce it, and take what benefit she may have by her title to a distributive part of the testator's personal estate.

The questions arising upon these pleadings were :

(1.) Whether the revocation in the codicil of *that part* of the will where *Mr. Acherley and Mr. Vernon* were made trustees, and appointing others, had revoked all the dispositions in that clause of the will.

(2.) Whether the lands *which the testator had articted to purchase*, and likewise the *fee-farm rents of which he was seised*, and which were not mentioned either in the will or codicil, shall pass by the *devise of his lands* in the codicil.

(3.) The testator having both *freehold, leasehold and copyhold lands*, and having in *his will*, declared a trust only of his *freehold and leasehold lands* without mentioning his *copyholds*, whether any trust thereof should result to the benefit of the heir at law.

As to the first point it was argued, that by revoking that part of his will where *Mr. Acherley and Mr. Vernon* were trustees, he had revoked all the dispositions in his will, because they were trustees in all of them, for he did not revoke * the *trust* to them, but that part of his will where they were trustees, which is every part; for they were concerned throughout the will; and tho' by the codicil he devised the *rest of his lands* to *Mr. Keck and Mr. Nicholls*, yet he having declared no trust thereof, they shall be seised of a resulting trust for the heir at law.

For the plaintiffs.

* P. 71.

It is for his benefit that revocations are favourably construed, to bring back the estate to him; and the same words in a limitation of an estate have been enlarged in favour of the heir at law, and streightened in the construction, when against him; as for instance; in the case of † *Nottingham versus Jennour*.

† This was a devise of

lands to his second son, *and his heirs*, for ever, and *for want of such heirs*, then to the right heirs of the testator, who died, and so did the second son without issue, living his elder brother: adjudged, that the second son had an estate-tail, and no more; because these words, *and for want of such heirs*, are void in point of limitation, and import no more than *want of such issue*, because the second son could never die without heirs, so long as his brothers, or any heirs of his father were living; therefore the heir at law, in this case, shall take by descent, and not by the will. Salk. 233.

So where a man releases part of a bond, it is a release of the whole bond; and by the same reason a revocation of part shall be a revocation of the whole.

(2.) By the devise in the *codicil of the lands purchased since the making his will*, the lands for which he had *articted* shall not pass, either in law or equity, as this case stands, because the time of conveying them to the testator was not come before his death, so that he had no consummate equitable interest therein, and consequently could make no disposition thereof.

Nor shall the *fee-farm rents* pass by a devise of *all his lands* since purchased, for there are no descriptive words thereof to make them pass; besides, *rents cannot pass by a devise of lands*, unless where the testator had no lands, for in such case they shall pass to make the words of the will operate; and as for the *fee-farm rents* which issued out of his own manor, they were not extinguished, but only suspended during his life, for they could not be merged, because his wife had an intermediate estate for life in the manor.

Now, to construe, that *rents shall pass by a devise of lands*, is a very hard construction in favour of a voluntary devisee, against an heir at law, and there is not a case in any law-book to warrant it; it is true, there is a case in *Leonard*, where it was held, that by the devise of a manor the rent passed, but it was because the testator had no other right * in the manor, but this rent; and therefore the devise had been void if the rent did not pass.

2 Leon. 41.

* P. 72.

(1.) Object.

Answer.

(2.) Object.

† Cro. Eliz.

656.

Answer.

But if it should be objected, that by a *devise of lands* all his interest therein would pass, this is contrary to several resolutions in the law; besides, where the words are doubtful, the heir at law shall not be disinherited.

If it should be likewise objected, that upon an *elegit de medietate terræ*, by the statute of *Westm. 2.* *rents* were extendible, that case in † *Cro. Eliz.* doth not warrant it; therefore no inference can be made from thence, that by a reasonable construction *rents* shall pass in a will by a devise of lands.

Now, in that very case in *Croke*, it is said, that a *rent-seck* would not be extendible; and since the statute *quia emptores terrarum*, if a man giveth lands in fee, reserving a *rent*, this is a *rent-seck* in a subject, because a tenure cannot be created at this day, and every *fee-farm rent*, when granted by the King, becomes *seck*, and therefore not to be extended.

3. It must be admitted, that by a devise of *all his lands* those *copyholds* which have been surrendered to the use of the will, shall pass to the trustees, and so it will by the words, *all his real and personal estate*, but there is no manner of trust declared, either in the will or codicil of his *copyhold lands*; the only words in the will, by which any trust is declared, are, as for and concerning *my freehold and leasehold estates*, the same shall be to such trusts, &c. which words *freehold and leasehold*, are exclusive of the *copyhold*; so that he having declared no manner of trust of his *copyhold estates*, the trust thereof must result to the benefit of the heir at law.

* 29 Car. 2.

cap. 3.

§. All declarations or creations of trust shall be manifested by some writing signed by the party, or by his last will in writing, or else shall be void.

It is true, by the * statute of *frauds*, all trusts not manifestly shewn by some writing are made void; but this must be intended of an *express declaration of trust*, and not of any *implied or resulting trust*; and this appears by another paragraph of the same statute, where the testator's intent is to be no farther admitted than it is expressed in the aforesaid limitation of a trust to a stranger; therefore if his intent is doubtful, it shall be construed for the benefit of the heir, because all the trust not disposed must result to such heir;

so that if the court should be of opinion, that the will is not revoked by the codicil, this copyhold must descend.

But admitting no trust is declared of the copyholds, it can be no imputation upon the character of the testator to say * he made a will, and did not appoint what trust his trustees should have in the lands he devised; for as great a man as he was in law, *another as great as he* hath made very strange bequests in his will, and that was *Serjeant Maynard*; and probably it might be the design of those great men, to exercise the wits of those of their own profession; it was clear, that this was intended by the *Serjeant*, for after some very unusual dispositions in his will, he takes notice that some men might admire at it, but that he did not care, *valet quantum valere potest*. * P. 73.

On the other side it was argued for the defendant, that the principal point in this case was the first; and that is, whether the *codicil* was a revocation of his will, and his counsel insisted, that it was not, for it was no more than an appointment and substitution of other trustees in the room of those whom he had appointed before by his will; there are no express words to revoke it, and a revocation shall be no more intended than the disinheriting an heir, for that must be by express words, and shall never be intended. Econtra for the defendant.

Now, according to such construction, which is contended for on the other side, this codicil would revoke itself; for by the first part of it he confirmed the devise to his first trustees, and afterwards revokes the trust to two of them, which is very inconsistent; but it is a more natural construction, that he revoked their *estate in the trust*, and appointed two other trustees to the same trusts, as before by his will.

But by the whole course of the will it doth not appear, that the testator intended any part of his estate should descend on his heir at law; therefore the will is not revoked by the codicil; if it should, then the annuity of 200 *l. per annum* given to his sister and heir at law, is revoked, and so is the 6000 *l.* given to his niece, because it was to issue out of the lands; but neither of them are revoked; and those specific legacies are sufficient to exclude them from any right they may have to the personal estate of the testator; like the case of *Betbell v. Betbell*, lately at the Rolls, where a man devised one shilling to his heir at law; this was adjudged an absolute exclusion from any right he might claim to the testator's estate.

It was insisted on by the will, and argued for the plaintiff, that the manuscripts should descend on the heir at law as *heir-looms*, but it cannot be presumed that the testator did devise them to his trustees to be sold, and the money to be laid out in a purchase, &c. for they are not in their nature * a personal estate for any such purpose, and * P. 74. the heir at law has no pretence to have them as *heir-looms*, for those are by + custom, but there can be no title by custom to these manuscripts, because the testator gave them a being, for they had none before his time. + Inst. 18.

(2.) As

(2.) As to the second point, whether the lands which the testator had *articled to purchase*, and the *fee-farm* rents shall pass by the devise of his lands in the codicil; it was argued for the defendant that they would pass.

And first as to the lands which he had *articled to purchase*, those lands must be either a real or personal estate; it will be absurd to say they are neither; and if they are either, then there are sufficient words in the codicil to pass them; for the testator takes notice therein, that he had *purchased lands* since the making his will, which word *lands* shall extend as well to those for which he had *articled*, as to others which were actually conveyed to him, and shall pass by a devise of his *lands*, as in some cases by a devise of all his *free lands*, a portion of *tithes* was adjudged to pass; so in the principal case, the word *lands* shall extend to all *estates whatsoever*; therefore the *rents* which he had *purchased* since the making his will shall pass by the devise of his *lands*; besides the lands for which he had contracted did not all rest in articles, for great part of the purchase-money was paid; but the heir can have no right to such lands, if it is not a realty; and if it is a real estate, then it may descend; but whatever is descendible is devisable, and here it is devised by the words *real estate*; and tho' the time of conveying those lands was not come, yet that will make no alteration of the case; for the vendor is from the time of the contract deemed a trustee for the purchaser.

And as to the *fee-farm rents* they shall be comprised in a *devise of his lands*, especially those rents of that nature which issued out of his own lands; for the intervening estate made to the wife of the testator for life, was by a devise of a rent-charge to her of 1000*l.* *per annum* for her life; and by her acceptance thereof those rents were merged in the reversion, and then by a devise of all his *lands* the rents will pass.

1. Objection.

* P. 75.

Answer.

3. As to the testator's *copyhold estate*, the objection is, that he having declared a trust concerning his *freehold and leasehold*, and none of his *copyholds*, for they are not so much as mentioned, whether a trust thereof shall result to the * heir at law; and it was argued, that it should not, because there are sufficient words by which they will pass, and those are by a *devise of all his real estate*; besides, the testator never had the legal estate in those copyholds, but it was others in trust for him, which trust he hath devised, and the codicil is a republication of the will.

Now there are authorities in point to prove, that *copyholds* will pass by a devise of his *real estate*; as where a contract was made for the purchase of lands, some of which were *copyholds*, it was adjudged, that by a devise of his *real estate*, those *copyholds* would pass in equity, and this was the case of *Woodier versus Greenbill*.

And

And so it was held in the case of * *Davy versus Beardsham*, that copyhold lands would pass by the *devise of his lands*, if the devisee claimed them in time.

* The testator had agreed for the purchase of a copyhold,

and pursuant to that agreement, a surrender was made out of court to his use; then he devised *all his lands* to R. B. &c. and died before admittance; it was decreed, that the copyhold lands shall pass, because the testator had a title in equity to recover them, and the vendor stood seised for him till a legal conveyance could be made. *2 Chanc. Rep. 39.*

2 *Obj.* There was another objection made in the behalf of the plaintiff as to that clause in the *codicil*, where the testator directed, that what he had devised to his sister in the will should be *in lieu of all demands she might have out of his estate*, that this clause might be satisfied by intending such demands, as she may have in her own right.

Ans. But in answer to this objection, it is absurd to say a thing shall be intended when it is plainly expressed; and here the words are in lieu of *all demands*; neither doth the plaintiff pretend to shew any particular demands she had to the estate, which she ought to have done (if she had any) as an inducement to what is thus objected in her behalf.

Answer.

Another objection was, that the testator could not design to exclude his sister from having any share of his estate by those words in the *codicil*, where he takes notice that the devise of her annuity was upon condition she should *release all her right* to his estate, because she being a *feme covert*, he very well knew that her *release* would not bar her.

Objection.

In answer to this objection, the word *release* in this place cannot be otherwise intended than an effectual release to bar her which must be by *fine*, and no other release.

Answer.

* The testator's widow being made a party to the bill, she by her answer, and now by her counsel insisted, that she might have some remedy for the *rent-charge of 1000 l. per ann.* given to her for life, either by distress or otherwise, for she could have none by the disposition in the will; and that she might have a decree for payment and satisfaction thereof, and of the arrears, and that a deduction of the parliamentary taxes might be apportioned to this rent-charge, in proportion to the rents of the lands out of which it issues; for that this being a rent-charge out of all the testator's lands, it would be in a great measure swallowed if it should pay more taxes than so much, issuing out of lands of the value of *1000 l. per ann.*

* P. 76.

Then her counsel insisted, that she might be quieted in the possession of the lands which the testator had left her for life; and that she might have the legacy of *200 l.* left to her by her father's will, with interest to be laid out in what she thought fit, as a remembrance of him; this being a separate legacy, and received by her husband the testator.

Objection.

But as to this 200 l. it was objected, that the testator having received it many years past, and tho' for his own use and benefit; yet he shall not be taken as a debtor, because he had devised his plate, jewels, and a legacy of 500 l. to her, besides his coach and horses; and therefore it shall be presumed she was paid; for according to the ancient rule *debitor non præsumitur donare*, so that her long acquiescence shews her consent; and if no proof could be made, that it was laid (as it really was in a piece of plate) there is no colour for interest to be paid for it, because the property of that plate was in the testator whilst he lived.

Thereupon *Mr. Vernon* the defendant consented to pay the 200 l. but without interest.

Then it was insisted for the widow to have the manuscripts as part of the testator's household goods, which were devised to her; for tho' the personal estate is devised to trustees to be sold to purchase lands, yet these manuscripts are no part of the personal estate, for they are not assets to pay creditors; therefore shall not go over to the trustees, and they cannot be heir-looms for the reason before-mentioned.

But the widow and the other defendant *Bowater Vernon* agreed in court to have them published between them, without any profit to themselves.

* P. 77.

* Upon the whole matter it was concluded for the defendant, that if this will should have such a construction as was contended for by the plaintiff, then the testator (notwithstanding all the pains he had taken to settle his estate) died intestate, and all his trouble was in vain, which is inconsistent with his character, who was an ornament in this court where he attended, and who acted in all things with the utmost accuracy and exactness.

But he acted in this as he did in all other cases, and made so good a will, that even artificial reasoning is hardly able to raise the least colour of doubt it; so that it is a little surprising it should bear any manner of contest in a court of justice and equity.

Lastly, it hath been said, that the heir at law shall not be disinherited without plain and express words for that purpose; but this saying is too general; it is true, if the words are doubtful, the heir shall be favoured; but if a man devises his lands to one, and in the same will devises the same lands to another, they are joint-tenants, which shews that the will is to be construed as one entire clause, and not as different clauses, and by this means contradictions will be avoided in the construction thereof.

Curia.

The principal question in this case is, whether the *codicil* revoked the will, and shall be taken as a course of different words and phrases, or as one entire scheme consummate by the sealing; and as to that matter it was held to be the best way to construe one part thereof with the other, as one entire scheme, and which was thought on and considered by the testator at one and the same time.

It is absurd to say, that the revocation in the codicil of an immaterial circumstance in the will, shall revoke the whole will, for it is no more than a revocation of part of his will, by which he had appointed two persons to be trustees, and appointing two other in their room, it is as if a person should set forth in a codicil, that T. S. whom he had appointed to be his executor, should not be his executor; this could never be taken as a revocation of the dispositions in his will.

Now here the testator by his codicil appointed two others to be trustees, and he devised to them *accordingly*, this must be intended as joint-tenants of the trust with those already named in the will; for the words *other trustees* imply some not before named.

* As to the lands for which the testator had contracted, the owners thereof continue trustees for the testator till conveyances are executed, and he might compel them to convey accordingly; and therefore they shall pass by this devise, tho' he had bought other lands which were actually conveyed to him; and this was never made a question in this court before; and as for the objection, that what rests in articles was neither lands or money, this is of no manner of weight; and therefore it deserves no answer. * P. 78.

As for the *fee-farm rents*, a devise of *lands* is sufficient to pass such *rents*, or any other right out of lands; and therefore where there is such a devise (as in this case) they shall not descend to the heir, especially since it appears on the face of this will, that the testator had devised two hundred pounds *per ann.* to the heir during life; and then in the codicil he takes notice that his heir had a sufficient provision made for her, and says that it shall be all which she shall have, and that on condition she should *release* all farther demands out of his estate both real and personal; and this *codicil is a good republication of his will*.

Now as to *republications* there is some difference between real estates, which will not pass without it, and the construction of a devise of personal estates, to make them pass without it, which construction is on the + statute of wills, which introduces a new method of conveying estates, (*viz.*) That any person having lands may dispose thereof by will, and this is founded on the reason of the common law, that a man cannot give what he hath not, as the heir in tail cannot grant or release to discontinue the estate-tail: now, admitting that rents will pass by a devise of lands, yet the testator had not those lands to devise, because the time of conveying them was not come; it is true, this objection was made, but it is of no weight, because, as hath been observed already, the vendors are trustees for the purchaser till a conveyance could be made.

Besides, a man's mind may change when he grows rich, and since the statute of frauds, a republication must be in writing.

As

As to the *copyhold estate*, tho' the testator by his will hath declared only a trust of his *freehold and leasehold estate*, so that no trust is raised by the will; yet by the codicil he shews plainly, that it was his intention to pass a trust in them, or to pass them in trust.

* P. 79.

* As to the *release*, it is true, it is no conveyance, if nothing passed by the will, nor, as this case stands, is it any conveyance to bar the heir at law of any demand to the testator's estate, she being a feme covert; but he having declared in the codicil, that she shall have her annuity on condition she releases, &c. this must be intended a *release by fine*, so that it may be effectual, otherwise she shall quit her annuity.

And this will, as to the personal estate, is good and perfect; therefore it was decreed, that the original bill should be dismissed with costs, but the defendant forgave the costs.

Money devised to be laid out on a special trust carries no interest.

And as to that part of this cause which related to the widow of the testator, especially as to the 200 l. which was devised to her by her father, to be laid out in something in memory of him; it ought to be paid out of the personal estate of the testator, it being received by him, and for his own benefit, and the rather, because he was executor to her father; and it is a misbehaviour in him not to perform his will in every respect, but it shall carry *no interest*, because it was to be laid out in something for his remembrance, which would have been no benefit to her husband, the testator, if laid out in his life-time, because it was not for her separate use; but was to be laid on a special trust, and to a particular purpose.

And as for the rest of the widow's demands, the defendant is ready to satisfy her as desired.

Affirmed in the house of Lords. *in Appeals for*

1725.

* D E

* D E

* P. 80.

Term. Sanct. Hill.

10 Georgii. In Cancellaria.

Hobson *versus* Staneer.

A Bill was exhibited by the plaintiff to be relieved against a bond obtained by the defendant, and (as suggested) without any manner of consideration; and to have another bond of 80 *l.* conditioned to pay 40 *l.* to be delivered up to the plaintiff, the money being paid, and likewise to be relieved against a settlement obtained from him by fraud, without consideration, he being a weak man.

Marriage settlement not set aside, there being no fraud proved or incapacity of the husband.

The case was, that the plaintiff married the daughter of the defendant, who was his first wife, upon which marriage the defendant procured a settlement from him by fraud, which was by settling part of his estate to the use of himself and his said wife, for life, remainder to trustees to preserve contingent remainders, remainder to the use of *Joshua Staneer*, and his heirs, who was the eldest son of the defendant, and brother to the plaintiff's wife, and of other part of his estate to trustees for 200 years, to pay any money the plaintiff should charge it withal, by way of legacies, or otherwise, remainder to another brother of the plaintiff's wife, and to his heirs for ever.

But the defendant, his father, took care to have a grant from him of that power which he had to charge the estate; and his mother-in-law procured another grant from him of 100 *l.* to be paid to her after the death of his wife, which was recited to be in consideration of the love and affection * he had for his wife, who was her daughter; and they obtained another bond of him of 80 *l.* conditioned to pay 40 *l.* without any manner of consideration; therefore he insisted, that this settlement and both the bonds ought to be set aside; and a second settlement which he made on his now wife, upon his second marriage, and in consideration of her portion, might be established and made good.

* P. 81.

The defendant answered, that the plaintiff having married his daughter, without his privity or consent, he was at first very much

displeased, but afterwards was reconciled, and took him and his wife into his house, and paid some of his (the plaintiff's) debts, and had done other services and kindnesses for him and his wife, so that he (the plaintiff) was indebted to the defendant in the sum of 100 l. and more; and that in consideration thereof, and of the love and affection which he did bear to his wife (who was now dead) he made the said settlement, which he insisted on to be good, and not to be set aside.

The single question upon the proofs was, whether this settlement shall be set aside, either for want of capacity in the plaintiff, or for that it was a voluntary settlement.

And as to that it was argued for the defendant, that the witnesses for the plaintiff had not shewn one single instance of his weakness, but generally, that he was a weak man; when the witnesses produced by the defendant prove, that he was a person sufficient to manage his own business and estate; and certainly it is not necessary, that every man who makes a settlement should be an ingenious or a learned man, for it is sufficient if he is of an ordinary capacity; therefore this settlement ought not to be set aside for any *incapacity* in the plaintiff.

Neither ought it to be set aside as a *voluntary settlement* to make room for another upon the plaintiff's second marriage, because the second settlement was obtained upon no better consideration than the first, which was had without any manner of fraud or circumvention; and so far from it, that it was proved the plaintiff always intended, if he had no issue, that his estate should go to the relations of his wife; and that such his intent continued even after the death of his wife.

* P. 82. But if the court should be of opinion, that this is a voluntary settlement, yet the bill ought to be dismissed for want of proper parties, because *Robert Hobson* (the plaintiff's father) who had the legal estate by the last settlement, is not made a party; besides, the plaintiff shall not have any * remedy to set aside the first, and to set up the last settlement, because he hath the same estate in both; therefore he can have no pretence to complain in a court of equity for relief against one settlement in favour of another; such an application as this ought to be made by him who is aggrieved, and who hath an estate by one settlement and none by the other.

Therefore it was insisted, that the first settlement was made on a good consideration, for what can be better than marriage? and the remainders limited on the same consideration are good.

As for the bond of 80 l. the defendant insists, that he paid the money for the plaintiff's use at two payments, &c.

Econtra for
the plaintiff.

On the other side it was argued, that this was a very extravagant settlement, in the first place, because there was no manner of provision for the issue of that marriage; and tho' there was an estate limited to trustees to preserve contingent remainders, yet there are

no

no remainders in the settlement; but the inheritance of all his (the plaintiff's) lands is settled on *Joshua Staneer*, his wife's brother; and in consideration of love to his wife; for after the limitation to him (the plaintiff) and his wife for life, the remainder in fee of part of the estate is immediately limited to one of her brothers, and the fee of the other part of the estate is limited to another of her brothers, with an intermediate term of years to trustees, which the plaintiff might charge; but care was taken to have a grant of that power which the plaintiff had to charge the lands from the plaintiff to that brother, so that after all events he might be in as good a condition as his elder brother.

Besides, this estate being no more than 50 *l. per annum*, and the plaintiff but tenant for life, there are other incumbrances set up by the defendant, (*viz.*) A grant of 100 *l.* to the defendant's wife at 5 *l. per cent.* during her life, and the bond of 80 *l.* which is impossible for him to pay, having only an estate for life in such a small estate; and this shews an apparent fraud on the face of the deed itself, and by this means the defendant will always have the plaintiff in his power to get any other writing from him to charge his estate.

As to the objection, that this second settlement was made upon no better a consideration than the first, the fact is quite otherwise, for it was made not only in consideration of marriage, but of 100 *l.* which the plaintiff actually received as a marriage-portion with his wife.

* But upon reading the settlement, it appeared to be thus, *¶* The estate was limited to *Robert Hobson* the father of the plaintiff, his heirs and assigns, during the lives of the plaintiff and his wife, in trust that he might employ the profits for the maintenance of the said plaintiff and his wife during their lives, with remainders to the issue of that marriage with other remainders over, so that the plaintiff had no estate by this second settlement. * P. 83.

The plaintiff hath no reason to complain, because it appears he is in a better condition by the first settlement, than by the last, for he hath an estate for life by the first, and none by the last. Curia.

And there being no fraud proved in obtaining the first settlement, nor any manner of proof of the plaintiff's incapacity, there can be no reason to set aside the first settlement.

But *Robert Hobson* the plaintiff's father, who had the legal estate by the second settlement, not being made a party to the bill, the plaintiff could have no decree, but had leave to amend his bill, &c.

Evans *versus* Hoskins and the city of Gloucester.

An assignment
of an interest
in a lease of
lands of the
value of 200 l.
per ann. in
consideration
of 20 l. paid,
and upon mis-
informing the
the plaintiff,
was set aside
as obtained by
fraud.
2 Eq. Cas.
88. pl. 10.

* P. 84.

THE case, *ff.* The *Lady Joan Cook* by licence from *King Henry* 8. granted the lands in question to the *Mayor and Burgessees of Gloucester* in trust, that whenever the lease made by her to one *Partridge and Anne* his wife should be determined, that they would make a new lease to them, or to the heirs of the said *Anne* at any time on request, on payment of twenty marks, and under the yearly rent of twenty marks for the space of thirty-one years, and with such clauses and conditions as in the old lease.

And that upon the expiration of such lease of 31 years, the defendants, the *Mayor and Burgessees of Gloucester* should at any time on the request of the heirs of the said *Anne* make a new lease to them in manner as aforesaid.

Now the plaintiff *Evans*, and one *Holeman Hoskins*, who was the father of the defendant *Hoskins* were coheirs of the said *Anne Partridge*, and he the said *Holeman Hoskins*, anno 1712. got an assignment from the said *Evans* of his right without any manner of consideration; therefore this bill was brought against the defendant *Hoskins*, the son of the said *Holeman Hoskins*, to set aside the said assignment as obtained by fraud and imposition on the plaintiff *Evans*, by misinforming * him of the state of his right, and against the other defendants, the *Mayor, &c.* to have a lease made to the plaintiff *Evans*, and to the defendant *Hoskins*, as coheirs to the said *Anne Partridge*, and according to the covenants in the original lease granted by the *Lady Cook* to the mayor, &c.

The defendants by their answer acknowledge, that the plaintiff and the defendant *Hoskins* are coheirs to the said *Anne Partridge*, and that the *Lady Cook* made such a grant to the *Mayor, &c. of Gloucester*, as in the bill is set forth, and that leases have since been made of those lands, pursuant to the covenants in the original lease.

But that anno 1712. the plaintiff *Evans*, in consideration of 80 l. paid to him by *Holeman Hoskins*, (the defendant *Hoskins's* father) assigned all his right in the lease to him the said *Holeman Hoskins*; and by another deed covenanted that the said *Holeman Hoskins* might make use of his (the plaintiff's) name in taking a new lease of the city, &c. and that his name might be put in the said new lease, in trust for the defendant *Hoskins*; and that on producing the said deed, the city made a new lease to the said *Holeman Hoskins*, without naming the plaintiff, but denies any fraud in obtaining the said lease.

The *Mayor and Burgessees* likewise own the pedigree, the grant, and the trust, as set forth in the bill; and that on shewing them an assignment, made by the plaintiff *Evans*, of all his right, they made a new lease to the said *Holeman Hoskins*, according to the covenants in the original lease.

This being the case, those who argued for the plaintiff, insisted that leases had been made from time to time according to the covenants and clauses in the original lease, and that the last lease granted to *Holeman Hoskins* was in the year 1690. and that the said *Holeman* in the year 1712. made application to the plaintiff *Evans*, who was a stranger to this covenant, and informed him, that the city insisted on 250 *l.* fine, and on a considerable advancement of the rent. For the plaintiff.

Whereupon the plaintiff *Evans* being thus misinformed, and not knowing but the lease in being would soon expire, executed this assignment in consideration of twenty pounds to him paid by the said *Holeman Hoskins*, and no more.

It is true, the defendant *Hoskins* who is executor of the said *Holeman Hoskins*, pretends that this assignment was made in consideration of 80 *l.* paid to the plaintiff *Evans*, which * he denies: but admitting it was so, it is a very small consideration for the purchase of such a lease, the lands being worth above 200 *l. per ann.* besides, at the time of this assignment, there were twelve years of the old lease unexpired; so that a fraud appears upon the very face of the deed itself. * P. 85.

Therefore it was insisted, that the said assignment should be set aside, and a new lease decreed to the plaintiff *Evans*; and that the defendant as executor to *Holeman Hoskins* may account to the plaintiff for the profits of the lease received by his father *Holeman Hoskins* in his life-time, and by him the defendant since his father's death.

On reading the proofs, it appeared, that there was no more than twenty pounds paid to the plaintiff as a consideration of his assigning his right in the lease to the said *Holeman Hoskins*; and that the benefit thereof was worth more to him than two hundred *per ann.* and that twelve years of the old lease were unexpired at the time when he (the plaintiff) executed this assignment; and it appeared by a letter which was proved to be written by the said *Holeman Hoskins*, purporting that he and the plaintiff were to pay two hundred and fifty pounds to the city, for a fine on renewing the lease when they were to pay only twenty marks, and no more.

And all that the defendant proved was, that the lands were not of so great a value at the time of the assignment as they were now, and that the city insisted on 150 *l.* for a fine.

Which is very true, but the reason was, because *Holeman Hoskins* would have a lease made to him exclusive of the plaintiff *Evans*.

Whereupon the court decreed, that this assignment should be set aside, and a new lease to be made to the plaintiff, and to the heirs of *Holeman Hoskins* according to the covenant in the original indenture made between the *Lady Jaan Cook* and the city of Gloucester. Curia.

And that the defendant (the executor of *Holeman Hoskins*) shall account for a moiety of the profits during the said *Holeman's* life, and since his death, and shall pay the costs of this suit.

* P. 86.

* *Hosier versus Read.*

Where an agreement by parol, but confessed in the answer, shall be executed, tho' not in writing.

THE plaintiff exhibited this bill to have the defendant execute such a lease as the court should direct.

The case upon the pleadings was thus, (*viz.*) There was an *agreement in writing* executed between the plaintiff and the defendant, by which the defendant was obliged to take a lease of a farm of the plaintiff for nine years, at the yearly rent of 140 *l.* and at the time of executing the said agreement, the defendant averred, that he had a lease of the *great tithes* of the parish of *Calverton*, and promised to manure this farm with the straw of the said tithes when made into dung; that by virtue of this agreement, the defendant entered and plowed some pasture ground, and grubbed up some bushes contrary to the said agreement; for which plowing and grubbing, the plaintiff demands satisfaction, and that the defendant might execute a lease according to the *said agreement*.

That there was a meeting between them to execute a lease, but then the defendant insisted upon some extraordinary conditions not in the *written agreement*; and that what chiefly induced the plaintiff to enter into this agreement, was the promise of the defendant to manure the lands with the straw as aforesaid.

* Nota; this agreement in writing was lost.

The defendant by his answer confessed, that he agreed to take a lease of this farm, by which * agreement the plaintiff was to repair the house, and outhouses, and to build a new dairy-house, and to sink a well; and that the defendant was to have liberty to plough up some closes, and to grub bushes in others, which was in consideration of 10 *l. per ann.* advance of rent; and that according to this agreement, he is willing and ready to execute a lease, and says that the *written agreement* on which the plaintiff insists is no more than a *memorandum drawn by an attorney*, and that the defendant had agreed to take a lease of the farm for such a term, and under such a rent, that the plaintiff agreed to let the defendant have the possession, for that *Lady-day* was near at hand, and until he (the plaintiff) should be satisfied that a clause in the lease, on which the defendant insisted, was usual to be inserted in leases there, which clause was, (*viz.*) The defendant was to covenant to leave the premises in good repair, the *accidents by fire and tempest* only excepted, and unless that * clause was inserted in the lease, the defendant refused to sign it.

* P. 87.

But the plaintiff insisting to have a lease executed according to the *agreement in writing*, and the defendant refusing it for the reason before-mentioned, the plaintiff exhibited his bill to enforce the execution of such lease.

Thereupon the defendant exhibited a cross-bill, in which he set forth the *agreement at large*, as before in his answer to the original bill,

bill, and insisted, that the plaintiff might execute a lease according to that agreement, which he was ready to execute on his part.

To which cross-bill the plaintiff made answer, by which he confessed, that by the *first agreement* he was to put the houses in repair, and to make a new dairy, and to sink a well; but that all this was to be done upon a supposition that the now plaintiff had a *lease of the said tithes*, (as he affirmed) and would manure the farm with the straw thereof, but denies that the plaintiff had any leave to grub up bushes in consideration of advance of rent, for that 10 *l. per annum* advance is no manner of consideration, the farm being very well worth 140 *l.* and so much the former tenant paid; but insists on a lease in pursuance of the written agreement; and that there was no clause therein by which liberty was given to grub any bushes in consideration of advance of rent.

There were two questions upon these bills, answers and proofs; the first was, if the plaintiff in the original bill shall have a lease according to the *written agreement*, or *memorandum* in writing.

2. If he shall be obliged to execute a lease to the defendant, according to the agreement set forth in the answer to the cross-bill, which was *not in writing*, that being lost.

As to this matter, the case is thus: one *Thompson*, an attorney, drew some heads of an agreement between the plaintiff and the defendant, which heads were *now lost*; but this attorney, who was chosen by both parties, made oath, that the purport of them was according † to the agreement set forth in the answers, both to the original and cross-bills; and that in the lease of the former tenant there was a clause to repair, but *fire and tempest* were excepted, and that it is an usual exception in leases there.

† *To put the houses in repair, to make a new dairy-house, to sink a well,*

to have liberty to plough some closes, to grub bushes in other closes, and that fire and tempest should be excepted.

* It was likewise in proof, that when the parties met to execute a lease, there was no objection made by the plaintiff but only to that exception, and that the written agreement was no more than a *memorandum*, that the defendant being likely to be out of the farm he then held, and *Lady-day* coming on, it was thought convenient he should have some place to enter with his stock till the plaintiff should be satisfied, whether such a clause was usual in leases. * P. 88.

It is true, this *memorandum* refers to the first agreement, but the plaintiff in his answer to the cross-bill confesses, that he agreed to most of the † clauses, but that it was upon other considerations, as he would now insinuate.

† Mentioned before in the margin, and which did not appear in writing, that being lost. Jones versus Sheriffe.

In the case of *Jones and Sheriffe* there were heads of an intended lease taken by an attorney *in writing*; but upon proof that some other clauses were agreed on between the parties at the same time, this court decreed, that those clauses should be put into the lease, notwithstanding the counsel on the other side strenuously insisted on the statute of frauds.

So

So in case of absolute mortgages (which was the old way of mortgaging estates) with a *promise by the mortgagee to make a defeasance*, which he afterwards denied to make, and insisted, that since the statute of frauds, he was not obliged to do, because not in writing; but on the hardship of the case, and on the fraud, the court decreed a defeasance.

Econtra. On the other side it was argued, that it would be of dangerous consequence to admit this *parol* and pretended agreement to be given in evidence directly against this written agreement; this is a thing which could not be done before the statute of frauds, much less since that statute was made.

Besides, this *parol agreement* is inconsistent in its very nature, it being for leave to cut bushes in a country where fuel is very scarce, and where many young oaks are preserved by those bushes whilst growing; and therefore it was insisted to have a lease executed according to the *written agreement*.

Curia. The agreement being *in writing*, the court was of opinion not to make any decree against it upon a *parol agreement*; but the counsel for the defendant insisting, that it did not stand on the foot of a *parol agreement*, because it was confessed in the answer to the cross bill; and it being fully proved by the attorney who drew it, and no objections being * made to it, but as aforesaid, the court, upon the reading the proof of the *second writing or memorandum*, and finding it referred to the *first agreement*, dismissed both the bills, but without costs.

* P. 89.

Scurry & Ux' versus Morfe.

A creditor cannot sue one co executor alone without the other.

THIS was a bill brought by the plaintiff and his wife, who was the widow of *Henry Bodily*, to have an account of the personal estate of the said *Henry*, and to be repaid some costs the defendant put them unto, by unnecessary suits at law.

The bill sets forth, that the plaintiff *Scurry* was executrix of the said *Henry Bodily*, her first husband, who likewise constituted the defendant *Morfe*, and another, as co-executors in trust for his widow, the now plaintiff, in order to assist her to recover the personal estate; but that the defendant *Morfe* now insists to act as executor alone; and farther, that the testator, *Henry Bodily*, her first husband, sued the executors of *Henry Bodily* the elder, but died before the said suit was ended; and thereupon this defendant *Morfe* prosecuted that suit to an account before a Master, but then released it; and therefore the plaintiffs now insist, that the defendant shall account, or that the account taken before the Master may be inspected.

The defendant by his answer says, that he hath done nothing but as executor to the testator *Henry Bodily*, and in trust for his children,

dren, and that this suit ought not to be carried on against him alone, who is but one of the three co-executors, so that there are not proper parties before the court.

It was argued for the plaintiff, that though there were three co-executors, yet the plaintiff might release one, and demand an account against the other of such part of the testator's goods as came to his hands, which demand was now made of the defendant, who was only a trustee for the plaintiff.

The court was of opinion, that the plaintiffs could not sue as creditors, one executor without the other, nor as residuary legatee; so the bill was dismissed for want of proper parties. Curia.

* Dawson *versus* Chater.

* P. 90.

AN estate was devised to *T. P.* who exhibited this bill against the heir at law, to have the possession thereof according to the will of the testator. A will shall not be established against an heir at law, without a trial at common law.

The defendant, by his answer, denied the making any such will as in the bill is set forth; but that if any such was made, it was obtained by the plaintiff by circumvention and fraud, when the testator was *in extremis*, and not of a sufficient capacity, or disposing memory.

The court was of opinion, that it would be to no purpose to proceed in the hearing this cause, for that it was a positive rule, that where there is any doubt on the proofs, a will shall not be established against an heir without a trial at law; therefore if a decree should be made against the heir, it would be reversed in the house of Lords for that reason. Curia.

And as to this matter, the case of my *Lord Montague* is full in point, to whom very great legacies were given, and he was made sole executor of the will, which he proved in *Doctors Commons*, and received the legacies; but afterwards exhibited a bill in this court as heir at law to the testator against the defendants, to whom the estate was devised; suggesting that he (the testator) was not *compos mentis* at the time of making the will.

And the *Lord Cowper*, who was then Chancellor, considering this will was contested by him who swore to the truth thereof, and profited under it, decreed against him; but the decree was reversed in the house of Lords, where it was resolved, that no decree against an heir at law shall establish a will without a trial at law, if the heir insists on it, especially where there is any lands devised.

Hack *versus* Leonard.

Bill to be re-
lieved against
a verdict in
ejectment, for
not repairing,
&c.

* P. 91.

Curia.

A Bill was brought against an *administrator* to have a new lease granted for the residue of the term granted by the intestate; the case was thus:

¶ An ejectment was brought by the intestate, upon a lease for years made by him to the lessee, rendring rent, with a clause of re-entry for non-payment of the rent, and for non-performance of the covenants, which on the part * of the lessee were to be paid and performed, and the breach was assigned generally for non-performance of the covenants in the lease; thereupon the agent for the lessee asked the lessor what rent was due to him, and that it should be paid, who replied, he would not trouble himself about the rent, but would set aside the lease; and the defendant being prepared to prove a *tender of the rent*, pleaded performance generally; upon which they were at issue, and at the trial, the defendant offering to prove the *tender*, the plaintiff did not insist upon the non-payment of rent, but proved a breach of covenant *for not keeping a barn well thatched*; thereupon the plaintiff had a verdict, and the defendant was turned out of possession, and soon afterwards the plaintiff died intestate; and now this bill was exhibited against his administrator to be relieved against the said verdict, and to have a new lease granted to the plaintiff for so much of the term of the first lease, which was not expired.

If a bond had been given for the performance of covenants in this lease, and had been afterwards put in suit, this court could not grant any relief against it; but the Lord Chancellor said he could not apprehend what damage the administrator could sustain, if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term; therefore it was referred to a Master to see what damage was done (if any) for non-performance of covenants, and at what time, &c.

*DE

* D E

* P. 92.

Term. Paschæ,
10 Georgii. In Cancellaria.

Carpenter *versus* Chapman, Friday, 24 April.

LANDS were devised by a father to his two daughters to augment their portions, and what estate the daughters should have in the lands so devised was the question.

Devise by a father to his two daughters, carries a fee-simple.

Those who argued, that they had not relied upon a case in 2 *Roll. Abr.* where the father devised his estate to his son and daughter equally to be divided; and it was adjudged an estate for life only in the daughter, there being no words either in that will or this to pass the inheritance.

“*Parker* Lord Chancellor decreed, that the daughters took the inheritance; for no other estate could be esteemed in augmentation of their portions; as a devise of land to *J. S.* paying 10*l.* carries a fee-simple, tho’ 10*l.* is not the hundredth part of the value of the land; and the reason is, because otherwise the devisee might be a loser; as if he paid the 10*l.* and died immediately after: so if a man devises 1000*l.* to be laid out in a purchase of lands to be settled on his son, his son will be intitled to the fee-simple of those lands, as hath been lately decreed.

* *Burdett versus Young.*

* P. 93.

“**T**HOMAS Sutton by his last will devised all his real estate (which was 135*l.* *per ann.*) to his wife for life, and after her death to two trustees to charitable uses; then he gave the use of all his personal estate whatsoever to his wife for life; then gave 2000*l.* to his two grand-children, to each 1000*l.* payable at their age of 21, or day of marriage; and if they died before such age or marriage, to charitable uses. Then he gave four pounds to his servants; ten pounds for mourning to several persons; two guineas for a funeral sermon; and directed 100*l.* to be expended in his funeral and tomb stone, and by a subsequent clause disposed of some of his household goods after his wife’s death.

Devise of a legacy to his grand-children, if they arrive to the age of 21 years, or marry.

“ He died, and the complainant, one of his grand-children, being arrived to the age of twenty-one, brought his bill against the wife to compel an immediate payment of his part of the 2000 l. legacy. The question was, whether the 2000 l. legacy is payable at the age of 21, or marriage; or whether the wife shall enjoy it for her life.

Talbot for the plaintiff.

Robins for the defendant.

The defendant insisted by her answer, that *Thomas Sutton* the testator was a *freeman of the city of London*, and could dispose a moiety only of his estate, and no more; and that the other moiety thereof belonged to her (this defendant) by virtue of the custom of *London*, and likewise her *paraphernalia*; and she insists likewise that the testator having devised to the plaintiff several *specific legacies* to be paid after her death, and having devised his personal estate to her, that this 1000 l. ought not to be paid during her life, nor any security to be given for the household goods.

At the hearing this cause, there was no other proof to shew, that *Thomas Sutton* the testator, was a *freeman of London*, but that one *Thomas Sutton* was admitted to his freedom in such a year, but it did not appear to be the same person.

Then the different penning this will as to the *specific legacies*, and this 1000 l. sheweth, that the testator intended the 1000 l. should be paid immediately, and not wait till the death of the defendant; the words of the will were,

ff. Item, *I give all my personal estate to my wife, and to both my grandchildren a thousand pound a-piece, if they arrive at the age of twenty-one years, or marriage*, which last clause controls the first devise of the *personal estate* to the defendant, and makes the subsequent disposition of the 1000 l. a-piece to his grand-children good; so that these legacies ought to be paid immediately after the contingency happened, and likewise security ought to be given immediately for those specific legacies which are to be paid after the defendant's death.

“ *Parker* Lord Chancellor: The question is, whether the devise to the wife is to be considered as an absolute devise of the whole personal estate, or only of so much thereof as should remain undisposed of; all the devises must either take effect immediately, or wait till the wife's decease; there can be no difference in the construction of them. The construction of the words, “*all my personal estate*,” has always been limited and confined to such part only as shall not be otherwise disposed of; it is an absurd interpretation of the intent of the devisor to suppose that he intended the devises of 10 l. mourning, &c. should expect his wife's decease. This devise therefore of the 2000 l. is a present devise, and payable as the children attain their age of 21, or day of marriage; wherefore he made a decree accordingly.

Note;

" *Note*; this cause was formerly heard before Mr. Baron Price,
" who sat for the Lord Chancellor, and decreed that the children
" were not intitled to the 2000 l. till the wife's death.

* *Bow versus Smith.*

* P. 94.

THE commissioners of sewers assessed all the lands from such a place to such a place in the level, to raise money to build a new sluice, and by warrant directed to the plaintiff appointed him to collect the money of the owners and occupiers of the said lands, who by virtue thereof made several distresses, and levied money of the defendant's tenants, for which he brought several actions (against the now plaintiff) in their names; and the said assessment being not strictly legal, because it should be assessed on every particular tenant proportionable to the damage he might sustain; therefore the warrants and distresses were not good, and so the plaintiff could not defend himself at law, but a verdict passed against him; and thereupon he exhibited his bill to supersede those actions, suggesting this matter, and that the said actions were vexatious.

Commissioners of sewers made a wrong assessment, and the plaintiff by their warrant distrained; the court would not relieve.
2 Eq. Cas. Abr. 206. pl. 1.

The defendant insists, that the commissioners had no power to tax him, for that there was an *old sluice* near the place where the new one was intended to be built, which was sufficient to secure all the level; and that the new sluice when built, would be of no manner of advantage to him, and consequently he ought not to be contributory to the charge of building it, and therefore that both he and his tenants had good right to bring actions for the money extorted from him.

* The Lord Chancellor would not help in this case; for if he did, then the orders of commissioners of sewers, and of the sessions, would be made in this court; now, here the assessment was wrong, and money was levied by virtue of such a wrongful assessment, which ought to be refunded, and a new assessment made; and the right way of making it is to assess the particular lands, according to the danger they lie in; and that it is not necessary to name the owners or occupiers of such lands, for the commissioners may not know them; for if not naming the owners should make the assessment void, there would be an end of all assessments by commissioners of sewers; therefore if that was the fact, it might be proper for this court to interpose.

Curia.
* P. 95.

The Lord Coningsby's case.

Bill in the dutchy court for lands, the defendant demurred, because the plaintiff did not aver, that the lands were within the dutchy, which is a circumscribed jurisdiction, and the demurrer held good.

THE plaintiff exhibited a bill in the *Dutchy Court* for several lands, &c. reciting some acts of parliament, and setting forth several patents and grants from the crown, and from thence derived a title to himself of those lands within the *Dutchy*.

The defendants demur to the bill, because the plaintiff did not expressly aver the lands to be within the *Dutchy*, but only by inference.

This demurrer was argued before the *Lord Letchmere*, Chancellor of the *Dutchy Court*, and before the *Lord Chief Justice King*, *Baron Page*, and *Mr. Reeves*, assistants, and they delivered their opinions *seriatim*, in which they all agreed, that the *Dutchy* was a circumscribed jurisdiction, and that in all such jurisdictions, the plaintiff in his bill or declaration ought to shew, that the cause did arise within the jurisdiction, otherwise the defendant may take advantage of it by demurrer.

That in courts of general jurisdiction, as the court of *Exchequer* or *King's Bench*, tho' universal as to the right; yet because circumscribed or limited as to persons, such averments must be made; tho' where the jurisdiction is general, such allegation is not traversable, as it is in a circumscribed jurisdiction; therefore the plaintiff should have positively averred these lands were within the dutchy, otherwise he cannot maintain this bill.

* P. 96.

Where a mortgagee helps to carry on a fraud, his mortgage shall be set aside.

* *Osborn versus Lea*.

THIS was a bill brought by the plaintiff, who was the widow of *John Osborn*, son of *Sir John Osborn*, to set aside a mortgage made to one *Weeden*, who was steward to *Sir John Osborn*, for that her title was precedent to the title of the mortgagee, it being by articles in marriage, and in consideration of a portion paid, that the lands were settled on her in jointure.

The defendant *Lea*, by her answer said, that she was only an assignee of the mortgagee, and did not know that there was any prior incumbrance, and the other defendant *Weeden* says, that he did not know any thing of the plaintiff's marriage, at, or before the time of the taking the mortgage, which was for 1200*l.* and that he had lent the greatest part of that money to *John Osborn* the mortgagor.

At the hearing this cause, it was insisted for the plaintiff, that this mortgage was fraudulent against the plaintiff.

First, because it is very likely that the mortgagee, who was a steward in the family, must know that there was a treaty of marriage between *John Osborn* and the plaintiff, and that he would not take

take a mortgage of the lands dated after the *articles*, by which the said lands were to be settled in jointure; but admitting the mortgage was made to him before he knew any thing concerning the marriage, or the *articles*; yet as soon as ever he knew that there was such a treaty, and that the articles were intended to be executed, he ought to have given notice of his mortgage to the plaintiff, or to those who were concerned for her in the said treaty of marriage; otherwise it is a meer fraud, and she ought now to be relieved, like the case of *Watts and Treswick* in my Lord Cowper's time, where the heir in tail, *knowing his title*, became a witness to a mortgage; and because he did not discover his title to the mortgagee, that very mortgage was established in this court; and he was decreed to suffer a *common recovery*; so in the case of *Haws and Potts*, where the brother, who was the remainder-man in tail, joined in the settlement of a jointure on his brother's wife, he was decreed to confirm the jointure.

On the other side it was said, that every case depended on its own circumstances, and that the case of *Watts and Treswick* was, that the son solicited the lending the money to * his father, and carried * P. 97. the deed of settlement to counsel, and was a witness to the deed of mortgage; so that he was all this while contriving a fraud on the lender; therefore it was a just decree, that the mortgage should be established against this fraud, and against his title in tail.

But in the principal case it appearing, that this deed of mortgage was dated 11 April 1710, and that the marriage was had in August following, and Weeden the mortgagee having made an equivocal answer, that the deed was dated on or about the 11th of April, and that he had paid the greatest part of the mortgage-money, when it appeared that he had not paid 400 l. part of the 1200 l. this gave some occasion to suspect him; and thereupon the mortgage-deed was produced in court, dated as aforesaid, (*viz.*) 11th of April 1710, and some of the officers of the stamp-office attending, they affirmed, that by the stamp on that deed, it could not be made in the year 1710, but in the year 1711, or after, because that stamp was not used before that year, (*viz.*) before the year 1711: so that there is a strong presumption it was antedated on purpose to overreach the settlement on the plaintiff.

Thereupon the Chancellor ordered that matter to be tried at law, and said, that if it was found that the settlement was made before the mortgage, as it was very probable it would, then the defendant Lea should have a remedy over against Weeden the mortgagee.

But as to the other point, he was of opinion, that it would be very hard for a mortgagee to be at the peril of losing his mortgage-money, if he did not give notice of his mortgage to any person whom he knew to treat about the sale, or any settlement of the lands in his mortgage; and that it very much differs from the case where the mortgagee himself helps to carry on such a treaty.

* D E

* P. 98.

* D E

Term. Sanct. Mich.

11 Georgii. In Cancellaria.

Smart *versus* Taylor.

Information
against a
person for
contriving to
marry a wo-
man to an
idiot.
2 Eq. Caf.
Abr. 584.
pl. 3.

TWO women being accessory to the marriage of a third woman, to one who was an idiot, and who had 45 *l. per annum* lands of inheritance, and being ordered to attend the court, stood in contempt, and refused to appear; and being committed, they now petitioned to be discharged; but one *Greenwood* being the principal contriver of this marriage, and the friends of the *idiot* having no evidence to impeach it in *Doctors Commons*, nor any evidence against this *Greenwood*, but the petitioners; it was insisted, that they should not be discharged without good security to give evidence of this contrivance.

Which the court thought reasonable, and therefore they were ordered to be kept in custody until they give such evidence or good security for that purpose; and it was directed, that the attorney should cause an information to be filed against *Greenwood*, and that the prisoners should remain in custody till they gave evidence against him in like manner.

* P. 99.

* Floire *versus* Sidenham.

Where deeds
were order-
ed to be
brought into
court, that
the plaintiff
might in-
spect them to
make out his
title.

J. C. — Sel. Caf. in
Chanc. 2.
2 Eq. Caf.
Abr. 377.
pl. 7.

THE plaintiff exhibited his bill as one of the coheirs of *Sir John St. Barb*, and claimed a moiety of the estate by virtue of a settlement made by one *Henry St. Barb*, the grandfather of the plaintiff, and of the now defendant, who having set up a will made by *Sir John*, in favour of the said defendant; and it being suggested in this bill, that the will (if any) was fraudulently obtained, it was prayed, that the deeds and writings concerning the lands in question might be brought into court, and the rather because the defendant in his answer owns the settlement as set forth in the bill, and that the plaintiff is one of the coheirs of *Sir John*; but says, that *John St. Barb*, the father of *Sir John*, suffered a common recovery of all or the greatest part of these lands, and declared the uses to *Sir John* and his heirs, so that he might lawfully devise the same by his will.

And

And now it was insisted for the plaintiff, that the court would give him an opportunity to inspect the said deeds and writings, as was done in the cases of the *Earls of Suffolk* and *Ferrers*; and this is but a piece of common justice usually done by this court, in favour of an heir; nay, it hath been done in the case of a devisee who is *hæres factus*, as particularly in the case of the late *Duke of Newcastle's Will*, and it ought the rather to be done in the principal case; for though the defendant hath proved this will as executor, yet he says in his answer, that if it should be set aside, there are other wills in being, by which the estate is devised to him.

It is admitted, that the plaintiff is one of the coheirs of *Sir John St. Barb*, but that he brought his bill in the Exchequer, suggesting the same matter as by the present bill, and that upon hearing the cause, that bill was dismissed; and now he hath brought a new bill in this court, and the defendant insists, that if the plaintiff hath any right, he should try it at law, and he farther insists, that *Sir John St. Barb* was tenant in tail general, and that he levied a fine of the lands now in question; so that if the common recovery, and the deed to lead the uses thereof, doth not avoid this settlement, the fine will do it effectually; and that the defendant is willing to shew the plaintiff all the * settlements of the family, but not all the conveyances, counterparts of leases, and old deeds. * P. 100.

The right of the plaintiff at law cannot be tried without the deeds, and there can be no reason why the plaintiff should contest the will before he knows whether the testator had power to make it, which cannot be known without the settlement, and the deed to lead the uses of the common recovery; for if the plaintiff hath any right, it is by virtue of this settlement made by his great grandfather. Curia.

And as this contest is between coheirs, where one sets up a will made in his favour, and insists, that he is not obliged to produce the settlement until the will is set aside, certainly that cannot be a reason for not producing it, because the plaintiff hath no better a right to see it then, (*viz.*) after the will is set aside, than he hath now; therefore the best method is to have the deeds brought before the court, and that the plaintiff shall be paid the costs of this suit.

Drummond versus Sir Matthew Decker.

THE case, *ff.* The plaintiff *Drummond* persuaded the *Marchioness Venlete* to lay out a considerable sum of money in *Bank annuities*, and she, or the plaintiff by her order employed the defendant to purchase the same, and furnished him with 50000 *l.* for that purpose; accordingly the defendant purchased annuities to that value in the name of the now plaintiff, but in trust for that Lady, and assigned part thereof, (*viz.*) 10000 *l.* to her use, who now by her bill demands the rest.

Whether a foreigner who married a subject of England attainted of treason, shall forfeit her portion to the King.
2 Eq. Caf. Abr. 477.
pl. 3.

The defendant *Sir Matthew Decker* confesses the sum demanded to be due to the plaintiff, but says, he hearing she was married to the late *Lord Bullingbrooke*, was advised not to pay it, without the decree of this court to indemnify him.

The *Attorney General* who was a party, insisted for the King, that if in the progress of this cause any right should appear to be in the crown, that such right might be saved, and submits to the demands, if she gives such proof as shall satisfy the court, that she is not married to any subject of the King of *Great Britain*, who is *attainted*.

* P. 101.

* Whereupon her *affidavit* was read, which was annexed to the bill, by which it appeared, that she was not married, and there was no proof that she was married; but if she was, it was argued, that the law of *England* should not be the measure of the decree of this court in such case, but the law of another country; this being a *bare trust* for a *foreigner*, and the court hath always a regard to the laws of other nations; as for instance; of the * laws of *Holland*, and of the laws of the *plantations*.

* 1 Chan.

Cases 232,

145.

2 Vent. 358.

Curia.

There is no proof made of the marriage of this Lady; and therefore there cannot be any contest between the parties as to that matter; if there should, it is probable that some difficult points might arise; for supposing she was married to the *Lord Bullingbrooke*, it would then be a question of great importance, whether this money was forfeited or not by his *attainder*; for since all foreigners are encouraged by act of parliament to place their money in the publick funds, it would be very hard that this money should be forfeited; for then the consequence would be, that a *Lady in France*, who hath a separate property from her husband in her own personal estate, would, by placing it in the funds pursuant to an act of parliament, be devested of that property, and have it transmitted to her husband by his coming over into *England*, so that he may dispose thereof at his pleasure; or by her being married to a subject of *England*, should vest in him in *France*, or in the King here, upon his *attainder* before or after marriage.

But as to the defendant *Sir Matthew Decker*, he hath done nothing but what he ought, for he is not to pay the money till secured; therefore it was ordered, that he should assign the securities to the Lady, and pay the rest of the money not laid out in stocks, and that he should have his costs.

* Theobalds.

* Theobalds *versus* Duffoy, Tuesday 17 Nov.

* P. 102.

A Feme sole having a term for 500 years devised to her for the residue thereof after an estate for life limited to *A.* married an alien; and with her husband, and with privity and consent of her relations, for a valuable consideration sold the remainder of the term to *J. S.* *A.* dies during the term, then the feme with her husband sold the term to *J. N.* who recovering the same at common law, the first sale being void, *J. S.* the first vendee exhibited his bill for an injunction.

Devise of a term for years to the mother for life, remainder to the daughter, this makes an executory devise. Will. Rep. 574. in notes

The question in this case was, whether an *assignment of a possibility of a term* shall be carried on in equity against a verdict at law, without a sufficient equitable consideration (which in the principal case was but 30*l.*); it is plain this assignment would be void at law, according to the 6th resolution in * *Lampett's case*; for the devise being of a term for years to the mother *for life*, remainder to the daughter, &c. this makes it an *executory devise*, and the 6th resolution in *Lampett's case* is, that such an *executory devise* cannot be granted over; therefore if such a grant is void at law, it should not be established in a court of equity.

By *Parker* Lord Chancellor: If an estate is granted to *A.* for life, Curia.
remainder to B. for life; this is a certain estate in *B.* and a trans-
ferrable interest, tho' he may die in the life-time of *A.* but if an
estate *for years* is granted to *A.* for life, and a grant to *B.* that he
shall have and enjoy the profits for so many years as shall be to come
and unexpired at the death of *A.* this cannot be good, by way of
remainder, and is therefore only a possibility, which at law cannot
be assigned over because *A.* hath a greater estate; for an *estate for*
life, is greater than an estate for years, be it ever so long; therefore
if *lessee for 1000 years grants it for life*, he hath granted all his
estate, and cannot make any limitation over.

Now the reason why a term for years was esteemed in law to be a less estate than a *freehold for life*, is this :

§. In former days all actions for titles to land were real, and lands being leased for long terms and fines taken for such leases, it was usual for the lessors, or their heirs, to suffer common recoveries, and by that means the lessees were evicted, because they could not falsify those recoveries, till they were enabled so to do by the statute † 21 H. 8. by which it was enacted, * *that a termor might falsify such recovery, as any tenant of the freehold might do by the course of common law, where he was neither privy or party to the same; and that notwithstanding any such recovery, he should hold and enjoy his term, according to his lease against the recoveror, his heirs and assigns.*

It is true, in those days the terms for years were usually granted for a short time; for no body would take long terms, because the tenant

tenant of the freehold could destroy them *ad libitum*, by suffering a *common recovery*, as aforesaid; therefore those estates for years were accounted the least, and next to estates at will.

But when the statute gave the *termor* a remedy to falsify a *common recovery* in defence of his term, then those estates for years became more permanent, and for that reason the lessees took long terms; and when they could not by the rules of law limit remainders over, in those terms, they contrived a method to do it by *executory devises*, and by *limitations of trusts* which were supported in equity.

Now, tho' in the principal case this should be accounted a *bare possibility*, and not assignable at law; yet since the defendant herself had assigned this *possibility* for a valuable consideration, and would now impeach it, because it was an interest not assignable at that time, though it hath since vested in possession; this seems contrary to good conscience, and a case wherein this court will interpose and hinder her proceedings at law.

Besides, there is another decree made by the Lord Chancellor Cowper in favour of the now plaintiff, which must be taken to be right whilst it stands unreversed; and till that is done, there ought not to be another decree in the same court in favour of the defendant; and upon the foot of the former decree it appears, that the defendant herself joined with her husband in conveying this right to the plaintiff, who is a fair purchaser of this residue or *possibility* of the term, and all this done by the consent of her friends, which makes the case much stronger against her; for even a contract made by an infant, by the advice and consent of his friends, hath been decreed to be good, and that in the most harsh circumstances imaginable, (*viz.*) By turning the interest into principal, upon condition that the creditor would not at that time extend the lands of the debtor; and this was the case of the *Lady Betty Cromwell*, an infant, who had a good estate in *Ireland*; but in the time of the rebellion there, she could not receive any of * the rents or profits of that estate; and being very much indebted to *Sir James Emery*, by judgments and statutes, he threatened to extend the estate which she had in *England*; which, if he had done, there would not be any thing left to support her; therefore she, by the consent and advice of her friends, agreed (tho' an infant) to turn all the interest then due, into principal, and to give fresh security for the payment thereof; and this agreement was established against her in this court; and why should it not against a *feme covert*, who hath done the like by and with the consent of her friends; and both she and her husband were at that time maintained by the money which the plaintiff paid for this *assignment*; therefore it was decreed, that there should be a perpetual injunction against the defendant; and that the first vendee should have his term.

At the hearing of this cause the *Attorney General* insisted, that the defendant being married to an *alien*, the King was entitled to her right;

Contract made by an infant, with the consent of friends, is good.

*P. 104.

1 Chanc. Rep. 29, 30. Cases in Chanc. 169.

right; and that nothing vested in the husband by virtue of this marriage to avoid it, and that the assignment could not be good against that right which the King had in this term.

To which it was answered, that if this had been an actual purchase of a term of years by an *alien*, the right would have vested in the King; but here the *alien* had no manner of right, for this being a *meer possibility*, could not vest in him by the marriage; it is true, marriage is a gift in law of a term for years to any subject, but not to an *alien*, for his wife may sue and be sued as a feme sole, notwithstanding her marriage with him. *See 1. Salk. 116.*

The wife being possessed of a term for years, and having married an alien, the marriage is not a gift in law to him of that term.

But to this matter the court gave no answer, probably, because the decree did not concern any right which the King might have, it being only to stay the proceedings at law, and to quiet the plaintiff in his possession.

Bateman *versus* Roach.

THE case, *ff.* The testator being seised in fee, devised his lands to trustees and their heirs, in trust for his nephew *John Hatbeway*, and for his niece *Sarah Bateman*, for their lives, remainder to the children of the said *John*, and to the children of the said *Sarah*, by her then husband *Bateman*, in trust that they shall have and receive the profits thereof when they come of age.

Devise to the mother for life, remainder to her children, &c. she had then one child, and about four years afterwards he made a codicil, and then she had two children more, who died; they had an estate in fee as tenants in common.

terwards he made a codicil, and then she had two children more, who died; they had an estate in fee as tenants in common.

* The said *John* and *Sarah* had each of them a child when this will was made, but the child of *John* died, and *Mary*, (the now plaintiff) who was the child of *Sarah Bateman* survived. * P. 105.

The testator having likewise devised 400*l.* to his said trustees, to the use of the said children, at their respective ages of twenty-one years; he afterwards made a *codicil*, by which he changed one of the trustees in his will, and confirmed all the devises therein; and at that time *Sarah* had two other children, who are since dead.

Now the representatives of the dead children claiming a share of the real estate, and a distribution of the 400*l.* the plaintiff exhibited her bill; and it was insisted for her, that this devise being *per verba de presenti*, none but the children born at the time of the making the will could take; like the resolution in *† Wild's case*, which was *† 6 Rep. 16.* a devise of lands to the husband and wife, and to the children of their bodies; it was resolved, that if they had any children at the time of the making the will, they had only an estate for life; but if they had none at that time, then those children who should be afterwards born would have an estate of inheritance in tail.

But on the other side it was insisted for the defendant, that though there was but one child at the making the will, yet *Sarah*, the

Econtra.

mother of that child, having two more at the making the *codicil*, they were entitled to take by virtue of the will, which was confirmed by the *codicil*; for the devise is *per verba in futuro*, and the legal interest was in the trustees.

Curia.

The court was of opinion, that since *Sarah* had but one child when the will was made, the testator could never intend it to be a devise *in presenti*, so that no other should take but that child, but but rather as a *future devise*, because it was *to the children of Sarah Bateman by her husband*; and it is very probable, that if he had intended it for the plaintiff *Mary*, who was the only child at the time of making the will, he would have taken notice of it in the *codicil*, when there were *two other children* to share with her; and tho' the expression as to the profits, (*viz.*) That they shall have and receive all the rest of the profits (after legacies paid) when they come of age; yet they have a right to it in their minority, at least to so much thereof as may be sufficient for their support and maintenance.

* P. 106.

* Upon the whole, the court was of opinion, that these children took an estate in fee, as tenants in common; and as to the 400 *l.* devised to them, that they who died had an equal right with the plaintiff *Mary*, who survived; for it is a † standing rule in this court, that where a portion or legacy is to be paid out of an *estate in lands*, at such a time, or at such an age, there, in favour of the heir at law, if the legatee dies before the day, the legacy or portion is sunk and gone; but it is otherwise if the legacy is to be paid out of the personal estate (as in the principal case) for there it vests immediately, and not to be divested, tho' the legatee die before the day appointed for the payment.

† Where a legacy is to be paid out of lands at such a time, there, if the legatee die before the day, the legacy is lost; but if out of the personal estate, it is otherwise.

Therefore it was decreed, that the trustees should account for the distributive shares of the two children (who died) out of the said 400 *l.* and also for their shares of the profits of the lands, from the death of their mother to the time of their death, and that they shall have all reasonable allowances, and leave to apply to the court at any time when they shall find it necessary so to do.

Neeve & al' *versus* Keck.

A man covenanted for himself and his heirs, to surrender a copyhold estate to such uses, and died before it was done; and a bill was brought against his heir for a specific execution of this covenant, and decreed accordingly. 2 Eq. Cas. Abr. 24. pl. 25.

THIS was a bill brought by the daughters and heirs of *Oliver Neeve*, by a former venter against the defendant, who was heir at law to *Francis Neeve*; and it was to have a specific execution of a covenant to surrender copyhold lands made by the said *Francis* on the marriage of *Oliver* with his second wife, who was the daughter of one *Sheffield*.

The

The bill sets forth, that in consideration of the said marriage, the aforesaid *Oliver*, *Francis* and *Sheffeld*, agreed to settle their several estates to the uses following:

¶ The estate of the said *Oliver* was to be settled to the use of himself and his intended wife for life, remainder to the first and every other son and sons of the body of the said *Oliver*, on the body of *A. B.* his intended wife to be begotten, with several remainders over, remainder to the right heirs of the said *Oliver* for ever; and *Mr. Sheffeld* agreed to settle his estate to the use of himself for life, and after his decease, to the use of the said *Oliver*, and *A. B.* his intended wife for life, remainder to the sons of that marriage in tail male, &c. and *Francis Neeve* agreed to settle his estate to the use of himself and his wife for life, with like remainders to the sons of *Oliver* in tail male.

* And pursuant to this agreement, the estates of the said *Oliver* * P. 107. and *Sheffeld* were settled to the uses aforesaid; and the said *Francis Neeve* in order to keep his estate in his name and blood, and in consideration of the said marriage, and of the natural love and affection which he did bear to his cousin *Oliver Neeve*, and in consideration of 5 s. to him paid by the said *Oliver*, covenanted for himself and his heirs to stand seised of the lands, &c. to the use of himself for life, remainder to his wife for life, remainder to *Oliver* and his wife for life, remainder to the first and every other son and sons of the said *Oliver* in tail male, remainder to the right heirs of *Oliver* for ever; and for the consideration aforesaid, he covenanted for himself and his heirs, to surrender his copyhold lands to the same uses before Michaelmas following.

Francis Neeve the covenantor and his wife are both since dead, and now this bill was brought against his heir at law, to have a specific performance of the aforesaid covenant, having bound himself and his heirs to perform the same.

The *Attorney General* who was of counsel for the defendant, confessed the agreement and the settlements made as set out in the bill, but insisted, that the defendant was not obliged to carry this covenant into execution; it is true, the settlement made by *Francis*, was in consideration of this marriage, and to keep the estate in his name and blood, and so far *Francis* would have been obliged to perform this covenant, and so would his heir at law. For the defendant.

But since the plaintiffs in this suit are the daughters of *Oliver* by a former venter, they are not likely to continue the estate of *Francis* in his name, for when they marry, they must change their names; neither are they within any of the considerations of this settlement; therefore in respect to them, this covenant stands merely on the foot of a voluntary conveyance, and such a * covenant was denied to be carried into execution against an heir in favour of a brother, for no other reason but because it was voluntary. * 1 Cases in Chan. 243.

It

Econtra for
the plaintiff.

It was argued for the plaintiff, that this was a good and formal covenant to bind *Francis Neeve and his heirs*, and that there was a very good and sufficient consideration for the same; for the marriage of *Oliver* is a consideration which goes thro' all the uses of this conveyance, but if that alone did not go thro' all the uses, yet *Oliver* and *Sheffeld* having settled their respective estates on this marriage, those settlements * together with the marriage are considerations sufficient to raise all the uses therein mentioned.

* P. 108.

Now *Francis* having covenanted for himself and his heirs, to surrender his copyhold lands before *Michaelmas* following to the same uses he had conveyed his freehold estate; he is a trustee in this court, for the covenantee, till that is done; and though he did surrender within the time, (*viz.*) before *Michaelmas*, according to the covenant, yet that is not material in a court of equity, where there is no regard had to such circumstances of time or place when the estate is once bound by the covenant; and as to the length of time before this bill was brought to have a specific performance of this covenant, it cannot with any colour of reason be objected to the plaintiffs, because they commenced this suit within a year after the remainder limited to them vested in possession.

It hath been objected, that in respect to the plaintiffs this covenant is voluntary, and stands merely on the foot of a voluntary conveyance, but certainly there is a wide difference between a voluntary conveyance and a voluntary covenant; for if a voluntary conveyance should be defective, this court will not enforce the execution thereof, because it being defective, it doth not bind in law; but as by a voluntary covenant a man is bound in law, so he is also bound in conscience in a court of equity; and the only reason why this court will enforce a specific execution of such a covenant is, because it is a more adequate remedy than the damages which might be given by a jury on an action at law, for breach of the covenant.

Therefore since *Francis Neeve* hath bound himself and his heirs by this covenant, and since *Oliver* was a purchaser under it, the plaintiffs who are his heirs are likewise purchasers, and ought to have a specific execution of this covenant, and the rather, because the widow of *Francis* enjoyed this copyhold estate during her life, by virtue of this covenant; so that the defendant hath thereby admitted an execution thereof in part of the uses limited thereby.

Curia.

The court was of opinion, that there were several considerations in these settlements sufficient to raise and support the uses; and first, it is probable that *Oliver* would not have settled his own estate in that manner which he had done, but in prospect of the estate now in question; for by that settlement there is no provision made for younger children; so that if there should happen to be a son of this marriage, the rest of the children would have nothing * out of their father's estate, but what he could provide for them in his life-time; and sometimes it is very prejudicial to a family where the father

* P. 109.

father hath a great estate, and no power to charge it with portions for younger children; as for instance, this case happened.

¶ The testator devised an estate of *four thousand pounds per annum* to the devisee for life, remainder over, but without any power of making a jointure to a wife; afterwards the devisee settled all his own estate in jointure on the woman he intended to marry, and with whom he did marry, and then he died without issue; so that the estate which he took by the will, went over to him in remainder, and the paternal estate was all in jointure to his widow, and his next relations had nothing to support them.

But in the principal case *Oliver Neeve*, who married the daughter of *Sheffeld*, was made richer, and that might be a consideration for settling his estate as he did, and the widow of *Francis* enjoyed this copyhold during her life, by virtue of this covenant by which her husband had bound his estate; therefore it was decreed, that the defendant should surrender this copyhold to the use of the plaintiffs and their heirs, and at their expence.

See Payton
ver. Bladwell,
1 Vernon
240.

Wing versus Wing & al'.

THIS was a bill brought by the father against his own son, and against the father of his wife, to have a deed of *settlement* set aside, because not made pursuant to the *articles of marriage* between him and his wife; wherein the plaintiff suggests, that he was imposed on, and sets forth several instances of oppression by the contrivance of his own son and his father-in-law, particularly, that it was agreed in and by the marriage articles between the plaintiff and his wife on their intermarriage, to settle his wife's estate, (which is the estate now in contest) *on the plaintiff and his wife* for their lives, *without impeachment of waste*, remainder to their issue; but that afterwards a deed of *settlement* was made, by which the plaintiff and his wife were made *tenants for life* only, and by consequence subject to be *impeached for waste*; that the plaintiff's wife died, and then his son the defendant married the daughter of the other defendant who was an attorney, and intrusted with all * the plaintiff's papers, and who very well knew all this matter; and that the plaintiff having afterwards discovered a *lead-mine* in the premises, he made a lease thereof to one *Jones for twenty-one years*, with power to dig for *lead-ore*, and entered into a covenant for quiet enjoyment, and became bound in an obligation of 1500 *l.* penalty, conditioned for performance of covenants, by virtue of which lease the lessee entered and digged for *lead-ore*, but was obstructed by the defendant; whereupon the lessee brought his action against the now plaintiff, who was arrested and committed for want of bail to the action, and all this was done by the contrivance of the defendants and their agents.

A decree was made in the court of Exchequer against tenant for life, to hinder him from committing waste, which decree was founded on a deed of settlement; and upon a bill now brought to set that deed aside, the defendant pleaded the decree in the Exchequer, which was overruled.

* P. 110.

The defendants plead a decreed made in the court of the Exchequer, in favour of the son against his father, to hinder him or his lessee, to open any mines, or dig for lead-ore, and that a perpetual injunction was granted against the now plaintiff.

For the defendant.

The counsel for the defendant argued to maintain this plea, that there being a perpetual injunction against the now plaintiff in a court which hath a proper jurisdiction, and can enforce an obedience to their decree, it would be inconsistent to have a contrary decree made between the same parties in this court, whilst the first decree stands unreversed; therefore to obviate that inconveniency, it was insisted for the defendant, that this plea might be allowed.

Besides, the plaintiff, (as it is proved in this cause) and as it appears in this deed of settlement which he would now avoid, had a power to charge this estate with 250*l.* which might be a consideration for the leaving out, or for his not insisting to have an estate for life, *without impeachment of waste*, which sum was at that time a smart charge on the lands, being then of the value of 30*l. per ann.* and no more, tho' since the making the said articles and settlement, the estate is very much improved by a casual discovery of some treasure in the bowels of the earth, but that cannot be a reason to make an equitable construction of this agreement.

Now if this *settlement* should be set aside, it may be difficult to know what estate the plaintiff would insist on; for probably he might insist on an estate-tail, by virtue of the articles, the *limitation* being to him and his wife for their lives, remainder *to their issue*; and by this means would strip the defendant of any benefit he might claim to those lands.

* P. III.

* Therefore since there is a decree made in the court of Exchequer for the now defendant against a tenant for life, to hinder him from committing waste, or digging mines, and a perpetual injunction for that purpose.

For these reasons it was insisted, that this plea might stand, for that this court cannot control a decree made in the *court of Exchequer*, which is equally binding with a decree of this court.

For the plaintiff.

On the other side the counsel for the plaintiff argued, that this plea might be over-ruled, for that the decree of the court of Exchequer was founded on this very deed of settlement, which the plaintiff would now avoid, and of which he now complains, for that decree is to subsist, and to be supported by that deed; therefore it is inconsistent to plead that to the plaintiff, which he endeavours by this suit to avoid.

Besides, the defendant hath not made any answer to that part of the bill, wherein the plaintiff prays an account of the *lead-ore* already dug by the defendant; for this decree and injunction on which he relies, is only to hinder the plaintiff to dig for *ore* in this land, but it gives the defendant no right to dig there during the life of the plaintiff; neither doth it preclude him from having an account of what is already dug by the defendant or his agents.

Moreover,

Moreover, a decree may be obtained in the court of *Exchequer*, by fraud, as well as a judgment in the courts of common law; and tho' this court cannot reverse either, yet when the fraud and practice appears, they may compel the parties to take no advantage thereof, as being against all conscience and equity.

Now it appears that this decree was obtained by fraud and oppression; for the attorney (who is one of the defendants in this cause, and whose daughter married the plaintiff's son) had all the papers of the plaintiff in his possession, and concealed them whilst the proceedings in the *Exchequer* were carrying on against him; so that he could not make any defence in that cause for want of the articles which he suppressed.

And it is in proof that the now plaintiff was in custody at the time this decree was made, and long before; and that it was made *ex parte* upon an *affidavit* of serving him with a *subpœna*; so that it being obtained by fraud in suppressing the articles, it cannot be a bar to the plaintiff to have an account of the profits, and to have this deed set aside.

* It was admitted by the defendant's counsel, that by the articles * P. 112. the plaintiff was to have an *estate for life, without impeachment of waste*; but it was insinuated, that before the deed of settlement was executed, the parties came to a new agreement, by which the plaintiff had power to charge the estate with 250 *l.* and that might be the reason why that clause (without impeachment of waste) was left out of the settlement, which is very true, if the fact was so; but that very sum was likewise mentioned in the *articles*, which the plaintiff was to have and receive out of his wife's estate; and it is not pretended that it was ever paid.

The court was of opinion, that the decree in the court of *Exchequer*, and the injunction to stay waste were founded on this deed of settlement, which, if set aside, the other must fall of course; and that there was such an appearance of hardship and oppression in this cause, that the court held it reasonable to over-rule this plea, and told the defendant's counsel, that at the hearing of the cause they might take what advantage they could thereof; and then the court would consider how far this decree in the *Exchequer* shall conclude this court in this cause. Curia.

Wafer

Wafer *versus* Mocato.

Lessee for years covenants not to alien without license of the lessor, under penalty of forfeiting the lease; he did afterwards alien without license; equity will not relieve him.

THE case, *ff.* There was an agreement between the plaintiff and the defendant, that the plaintiff in consideration of 1300*l.* to be paid to him by the defendant, should *assign a term of years*, which he had in certain *houses in London*, which were leased to him by the city, with a covenant that the lessee should not *alien or assign the term without leave of the city*, under the penalty of forfeiting the said term.

But the plaintiff having not yet gotten any *license from the city*, the defendant would not take any *assignment* of this term for years till such *license* should be procured, but made over 150*l.* *South-sea* stock to the plaintiff, as a security to perform the agreement on his part.

Afterwards, and before any *license* was procured, the plaintiff assigned all his interest in this term to the defendant, who prevailed with the plaintiff, that the consideration mentioned in the assignment should be 600*l.* and no more, which was done, because the true value might be concealed *from the city*, fearing that when the defendant should renew the term, the city might raise the fine and the rent in proportion.

* P. 113.

* Now it being plain that the plaintiff could have no remedy at law to recover any more than 600*l.* that being the consideration mentioned in the assignment, and probably not that neither, because having assigned the term without license from the city, it was a forfeiture thereof; and by that means, and by colour of an entry and eviction by the city, the plaintiff would be barred of his demands, therefore this bill was brought to have the 1300*l.* according to the agreement for the assignment of this term for years, and to be relieved upon the whole matter set forth as aforesaid.

The defendant by his answer insists, that he was to pay but 150*l.* *South-sea* stock, for the aforesaid assignment, and that the houses were of little value, and that the plaintiff had forfeited this term by making an assignment thereof without *license*, and therefore the assignment was void.

Coria.

Where a man makes a lease for life, or for years, upon a condition of re-entry for a forfeiture, or that the lease shall be void, if the lessee assigns or aliens it without license, and afterwards the lessee doth assign it without license, this is a forfeiture, and such a forfeiture against which this court cannot relieve, because it is unknown what shall be the measure of the damages; for this court never relieves but in such cases where it can give some compensation in damages, and where there is some rule to be the measure of such damages to avoid being arbitrary.

Mitford

Mitford & al' *versus* Lord Herbert, Pritchard, Croom,
and others.

THE case, *ff. John Bromley* being possessed of a considerable personal estate, married the daughter of the defendant *Pritchard*, from whom he afterwards departed, and thereupon she obtained a sentence for *alimony*, which he the said *Bromley* disobeying, he was excommunicated; then he went to *Paris*, and placed 2000 *l.* in the town-house there, in the *Lord Herbert's* name, and had a mortgage on the *Duke of Powes's* estate for securing the repayment of 1000 *l.* and interest, and had 240 *l.* in ready money and jewels in his trunk, and some wearing apparel, and died intestate; after whose death the aforesaid *Croom*, one of the defendants, possessed himself of this 240 *l.* and of all * the jewels and wearing apparel, * P. 114. pretending the same were given to him by the intestate in his life-time; and the widow of the said *Bromley* having by her last will devised some legacies, made the defendant *Pritchard* executor, and died.

Where a person insisted on an absolute gift by the intestate in his life-time, when it appeared to be only a trust.

Afterwards *Pritchard*, by virtue of the said will, possessed himself to the value of 700 *l.* of the said intestate's estate.

Thereupon the plaintiffs, as nephews and next of kin to the said *John Bromley*, exhibited this bill to have a distribution made to them of a moiety of the said intestate's estate; and that tho' *Pritchard* is entitled to the other moiety by virtue of the will of his widow, yet he ought to take a moiety of the *bad debts* as well as of the good; and that the defendant *Croom* might be accountable to the plaintiffs for a moiety of the said *Bromley's* estate in his (*Croom's*) hands, notwithstanding the pretence of a free gift made thereof to him by the said *Bromley*, in his life-time.

The counsel for the defendant *Pritchard* submitted to account for a moiety of the said *Bromley's* estate in his the said *Pritchard's* hands; but insists, that he is entitled to have an allowance of such debts which were owing to him by the intestate, who having left his wife, the daughter of the said *Pritchard*, without any support; and being gone into places remote, she was maintained by the defendant *Pritchard* several years, so that he is entitled to retain so much of her husband's estate as shall be accounted a reasonable satisfaction for such maintenance, and as a debt due to him from the husband.

For the defendant.

And as for the pretended gift to the other defendant *Croom*, it will be the interest of the defendant *Pritchard* to have it set aside, for then he, as executor to the widow of the intestate, will be entitled to a moiety of his estate in his hands; for in truth it was not a gift, but a trust in him, contrived between the intestate and the said *Croom*, for that the intestate being *excommunicated*, could not make

a will; and if he had made one, it could not have been proved; so to avoid this disability, this method was contrived between them to dispose the personal estate in the life-time of the intestate.

As for *Adderley*, another of the defendants, there being no proof that he intermeddled with any of the intestate's goods, the bill, as against him, ought to be dismissed with costs.

* P. 115. * So that the chief contest in this cause was concerning the 240*l.* received by the said defendant *Croom*, which as his counsel insisted, was an absolute gift to him a few days before the intestate's death, subject to pay two legacies of 10*l.* a-piece, and to pay his apothecary's bill, and the expences of his funeral; and since being *excommunicated*, he could make no will, it is the more reasonable he should dispose his estate in his life-time in this manner; and it is in proof, that he often declared, that his own hands should be his executors, and that he would give all away whilst he was living; and this is a very natural disposition to the defendant *Croom*, who was his near relation and *Godson*, and the person whom he most trusted during the time he absconded on the account of the excommunication, and the prosecution by his wife, and her friends.

So that it is a donation *mortis causa*, and that is, where any thing is given for fear of death on some thoughts of a present or future danger, which donation is gratuitous, and an absolute gift, and the defendant is properly intitled to the benefit thereof; and therefore not to account to the plaintiffs, or any other, for this gift.

For the
plaintiff.

The counsel for the plaintiffs averred, that the defendant *Pritchard* had admitted a great part of what they had prayed in the bill, but that he insisted on the allowance of some debts due to him from his daughter the intestate's wife, and which he ought not to retain out of the money in his hands, but out of all the moiety of the intestate's estate to which he was intitled by virtue of her will.

And as for what is insisted on by the defendant *Croom*, that the intestate in his life-time gave him the 240*l.* now in his hands, there is no colour that he should not account for it; for admitting it was a donation *mortis causa*, such a gift is good by the civil law as a will; but by that law an *excommunicated* person cannot make a will, for if he could, then such persons might dispose of their estates by will in this manner.

Neither was this an absolute gift to the defendant *Croom*, for it is in proof, that it was a bare trust; and this appears by the best proof that can be made, and that is *testimonium rei*, for after the delivery of the goods, and the receipt of this money, the intestate appointed *Croom* to pay such debts and legacies to his nephews; besides, there is a very strong presumption, that the testator was not of a disposing memory at the time of making this pretended gift, for he said it was all which he had in the world; so * he forgot a great sum which he had in the town-house at Paris, which can never be intended, if he had been in his senses.

* P. 116.

The

The court was of opinion, that this was an odd claim by the defendant *Croom*, as an absolute gift of this 240 l. when it plainly appears to be a *trust*. Curia.

It is true, he swears in his answer, that the intestate gave him all his personal estate and directed him to pay the apothecary's bill, and 10 l. a-piece to his two nephews; but this direction was subsequent in time to this pretended gift, and that proves it to be a trust for the intestate.

Therefore it was decreed, that the defendant *Croom* should account, and that the bill should be dismissed with costs as to *Adderly*, and as for the other defendant *Fritchard*, that he should be allowed what was due to him for the maintenance of the intestate's wife whilst he was living, but not for her maintenance since her husband's death; but he is not intitled to costs of this suit, unless they had been taxed, and ascertained in the life-time of her husband.

Ord *versus* Blackett.

THE case, *ff.* One *Ord* who was seised of an estate worth 400 l. *per ann.* had a natural daughter by *Sir William Blackett*, to which daughter she devised all her estate, and made her sister *Martha Ord* executrix, and appointed her to be *guardian* to the infant, and died. Where a person was reported by a Master to be a fit guardian to a natural child; yet such guardian was not allowed, but the child was placed with the father who owned her.

The executrix pursuant to the will, sued for this estate, but died soon after the suit was began, having first appointed the now petitioner *Ord executrix*, who renewed the suit, and recovered the lands for the infant.

But *Sir William Blackett* removed her from school last *Christmas*, and sent her into the country where she hath been kept ever since; for which reason the petitioner made application to the court of Chancery, complaining that the infant was removed from a school where she might have proper and suitable education, and sent into the country where she could have none; and this petition being referred to a *Master* to name a proper school, and a *Guardian* for this infant, he reported the petitioner to be a *fit guardian*, and *Mr. Cavalrie's* school a proper school for her education; and therefore petitioned that the child might be delivered to her, and sent to the said school.

* The counsel for *Sir William Blackett*, the child's father, and who owns her as his daughter, and who preserved this estate for her against the heirs at law, consented to send the child to *Mr. Cavalrie's school*, but opposed the delivery to the petitioner, or that she should have the laying out any money for clothes, or other necessaries for the child, she being very poor, and having already pretended, that she deserved 180 l. for her care in attending this child; therefore the money to be laid out for necessaries ought rather to be paid to *Mr. Ca. or his wife*, than to the petitioner. Curia. * P. 117.

The

Curia.

The court was of opinion, that removing this child from school into the country, to *Sir William Blackett's* house, could neither be useful or instructive to her, because he was a single man, and kept no persons proper for her education; yet it was not thought reasonable to remove her from his care since he owned her to be his child; but that he should pay the costs of the petitioner's application to the court out of his own money; for otherwise he might remove her from one school to another, and the costs of applying to this court, would be paid out of the infant's estate.

Smithson & al' *versus* Dodson.

Tithes of hay
ought to be
paid in grass-
cocks.

THIS was a bill brought by the *parishioners of Gargrave in Yorkshire* against the defendant their vicar, to produce an *ancient terrier* in his custody, which shews the method of payment of tithes in that parish, which they suggest to be a *modus*, (*viz.*) For hay the vicar is to have the 10th *grass-cock*, and three half-pence for every *milch-cow*, and a *penny* for every *swarm of bees*, and *six-pence* for every *orchard*, and the bill prays, that the court would direct an issue or trial at law, to settle this *modus*; and sets forth, that the predecessor of the defendant did about 30 years since alter the payment of this *modus*, and combined at that time with his clerk to raise the fees for *burials*, &c. which fees had been paid ever since.

* P. 118.

The defendant admits there was a *modus* some years since for payment of tithes in this parish, and that he hath a *terrier* in his custody of all the tithes payable to the vicar, and that he had been very much harassed at law, when he was willing to take the tithes according to the *terrier* in his custody, so as he might have them peaceably; and as to the fees for *burials*, *marriages*, *christenings*, and *churching of women*, he * insists, that the same should be paid as usual; for that they were not proper for a *modus*, because there is no *canon* to ascertain what shall be paid, if the sums now paid should be discharged; but it is not in other cases, for if a *modus* should be destroyed, then tithes in kind must be paid; therefore as to that matter, the bill is improper, and ought to be dismissed since the court hath nothing before them to ascertain the measure of such fees; and the defendant is in no fault, but by continuing the payment of the fees as he found them paid before he was vicar.

Curia.

The court held, that the *tithe-hay* must and ought to be paid in *grass-cocks*, and as to the tithes of *cows*, *bees*, and *orchards*, the parties did not differ in the manner of payment, but only in the surplice fees for *burials*, &c. therefore it was ordered that they should attend a Master to settle how far they differ in that matter, and the consideration of costs should be reserved till the master makes his

report; but as to that part of the plaintiff's demands which the defendant did not controvert, nor insist on any thing to the contrary, the parishioners were ordered to pay costs.

Where the parishioners shall pay costs.

Lucas executor of R. A. *versus* Adams.

THIS was a bill brought by the executor of *Sir Robert Adams* to have an account of 300 l. borrowed of him by the defendant *Adams*, for the payment of which said sum with interest, the defendant entered into a bond to the said *Sir Robert Adams* of the penalty of 400 l. conditioned for the payment of 200 l. and at the same time gave him two notes under his hand of 50 l. each note, but afterwards by unfair means, prevailed on the obligee who was superannuated, and not in his senses, to give him (the defendant) a release of all demands on the payment of 20 l. and on pretence of being his near relation.

The obligor on payment of 20 l. to the obligee procured a bond and notes for money to be delivered up to him upon pretence that he was poor, and nearly related to the obligee; but that not being proved, he was ordered to account for the bond and notes.

The defendant by his answer says, that he being nearly related to *Sir Robert Adams*, did borrow the money of him as mentioned in the bill; but being poor, he the obligee when he was in his perfect senses, (*viz.*) Anno 1714. promised to forgive him this debt, which in the year following, (*viz.*) Anno 1715. he did accordingly forgive, therefore insists, that he is not liable to account for it to the plaintiff.

* And now his counsel did admit, that there was an *inquisition* * P. 119. taken, by which *Sir Robert Adams* was found to be out of his senses; which *inquisition* was taken in the year 1720, but goes no farther back than three years, (*viz.*) To the year 1717; and this debt being discharged in the year 1715, the defendant is willing to try, whether the obligee was then in his senses, or not?

The counsel for the plaintiff said, that if the court should make the least difficulty to decree for the plaintiff upon reading his proofs in this cause, that he would then be willing to try it at law, whether the obligee was in his senses at the time he executed this release; but if upon the proofs it should appear that he was not in his senses, then the plaintiff ought not to be sent to a trial of that matter at law.

Econtra for the plaintiff.

It is true, the defendant swears in his answer, that he did believe that the obligee had not forgot either the bond or the notes at the time of his sealing this release, which he obtained as his near relation, but gives no manner of proof how, or how near he was related, which he ought to have done, because it is the pretended consideration of this release; therefore if that fails (as it doth) the rest must fall of course; as where the testator devised 100 l. to T. S. by the name of his cousin T. S. when in truth he was not related to the testator, in such case the legatee shall never have this legacy.

Besides, there is no manner of proof, that any such consideration of *nearness of relation* was mentioned at the time the *release* was executed, but that the defendant brought 20*l.* and told the obligee that he had a bond, which he came to pay, and immediately on payment of the said money he got up the bond, and obtained this release; but after all, the payment of the said 20*l.* is inconsistent with the pretended consideration of *nearness of relation*, which the defendant hath set forth in his answer.

Curia. Here is a bond got by the obligor from a weak person, the obligee, and a *release* of all demands, upon pretence of *nearness of relation*, and of being poor; but neither of these considerations are proved in the cause.

But it plainly appears that the obligor paid 20*l.* as a consideration of this *release*; and there being no notice taken at that time, of what sums were due, either on the bond or notes, this seems to induce a suspicion, that the payment of that money was the only consideration of delivering * them up, and executing this release; and that the obligee did not know at that time that any thing more was due to him, being very weak and forgetful, and incapable of transacting any business; so it was decreed, that he should account both for the bond and notes.

* P. 120.

Cox & al' *versus* Coffin & al'.

Bill against a mortgagee to compel him to reconvey upon payment of principal and interest.

THE plaintiff, who was *heir at law*, exhibited a bill to redeem a mortgage made by his ancestor; and the case upon the pleadings was thus:

Jf. One *Butchin* having occasion for money, borrowed it of one *Fry*, and to secure the repayment thereof, with interest, he mortgaged his lands to the said *Fry* for 2000 years: *proviso* to be void upon payment of the principal and interest; and soon afterwards he died.

In the year 1696, the plaintiff and her sister, who were heirs at law to the mortgagor, exhibited their bill to redeem, and the defendant *Coffin* was employed by them to prosecute the suit; and *Fry* the mortgagee, in his answer to that bill, submitted to a redemption upon payment of the principal and interest; but *Coffin* perswaded them (being ignorant women) to drop that suit, alledging that the lands were not worth redeeming.

Fry the mortgagee, some time afterwards, by will, devised this term and estate to one *Grove*, whom he made executor, and died; and then the now defendant, *Coffin*, purchased it of the said *Grove*, and by his agent *Willis*, threatened the now plaintiffs to exhibit a bill to foreclose them of the equity of redemption.

The now defendant *Coffin*, after he had purchased this term of *Grove* for 100*l.* in consideration of so much money paid to him, assigned

assigned part of the estate to one *Lake* for 500 years, being part of the said term of 2000 years, and afterwards sold the remainder of the term to *Willis*.

Now the end of this bill was, that the defendant *Coffin*, who knew the plaintiff's title, and by unfair and fraudulent means, dissuaded them from pursuing their right, and afterwards purchased this mortgage for himself, may be obliged to reconvey, upon payment of so much money, which he paid for the purchase.

And the counsel for the plaintiffs said, that there were two things to be considered in this cause.

- * (1.) If this is a redeemable estate; and if so, then,
- (2.) On what conditions it shall be redeemed.

* P. 121.

(1.) And as to the first point, it is plain that this is a redeemable estate; for upon filing the first bill, *Fry*, the original mortgages, under whom the defendant claims, submitted to a redemption; but the defendant *Coffin*, who was then solicitor for the plaintiffs, dissuaded them to redeem; and the other defendant *Willis*, who acted for *Coffin*, threatened to foreclose the equity of redemption; now this shews, that he knew it was a redeemable estate; therefore the plaintiffs are entitled to redeem.

(2.) As to the second point, upon what terms the plaintiffs shall redeem, it was insisted, that they should redeem upon payment of the principal sum of 100 l. and interest, which said sum of 100 l. the defendant *Coffin* paid to *Grove*, upon the purchase of this term; for as he was solicitor for the plaintiffs, he is to be taken as a trustee for them, and therefore should be contented to receive what he paid for them, deducting the rent.

And as for *Lake*, who took the term of 500 years of *Coffin*, this seems to be a trust for him; but if it was granted to him *bona fide*, without any trust; yet he took it with his eyes open, and shall not be in a better condition than *Coffin*, under whom he claims; therefore it was insisted for a decree to redeem, &c.

* DE

* P. 122.

* D E

Term. Sanct. Hill.

11 Georgii. In Cancellaria.

Buggins *versus* Yates.

Lands devised
to his wife
and her heirs,
to be sold for
payment of
debts and le-
gacies in aid
of the personal
estate; and not
being sold, if
the personal
estate is sufficient
to discharge the
whole, the heir
shall have the
lands as a resulting
trust.

THE case, *ff.* One *Buggins* being seised in fee of several estates in *Middlesex* and *Worcestershire*, Anno 1674, devised the lands in question to *Mary Buggins*, his wife, and to her heirs and assigns for ever, to be sold to pay his debts and legacies in aid of his personal estate.

and not being sold, if the personal estate is sufficient to discharge the whole, the heir shall have the lands as a resulting trust.

But the personal estate being sufficient to satisfy and discharge all his debts and legacies; and the real estate not being sold, the plaintiff, as heir at law to the testator *Buggins*, insisted, that he is entitled to these lands as a resulting trust for him, and that the devisee was a trustee for that purpose.

Curia.

The court was of opinion, that where lands are devised to be sold in aid of the personal estate for payment of debts and legacies, and the lands are not sold, for that the personal estate is sufficient to discharge the whole; it is plainly an implied trust in the devisee for the heir at law, and he is entitled to come into this court to have a reconveyance, and an account of the profits.

He did not
doubt but his
wife would be
kind to his
children; this
is void for in-
certainty.

* P. 123.

And the court being about to make the decree, it was said, that here was likewise a *trust of the personal estate*, (*viz.*) The testator in his will declared, that he did not doubt but his wife would be kind to his children; but the court was of opinion, that those words gave a right to no child in particular, or a right to any particular part of the estate, * but that the clause was void for uncertainty; and thereupon it was decreed, that the defendant should make a reconveyance of the real estate.

But then it was insisted for the defendant, that the court would direct an inquiry of the value of the testator's personal estate, because it appeared in the cause, that there was 6900 *l.* standing out in debts and legacies; and that the personal estate amounted to 4000 *l.* and no more, so that if the devisee paid the rest of the debts and

and legacies out of her own effects, she is intitled to be repaid out of these lands devised to her; and there is a very strong presumption, that she paid to the value of this land; for there is a legacy of 2000*l.* devised to her, which she never raised, because she apprehended the estate was her own, being devised to her and her heirs; and therefore she devised it to her second husband *Yates for life*, which he enjoyed 22 years under that devise, and she likewise devised the inheritance in parcels to her three sons, (*viz.*) To the plaintiff, and the defendant, and to another son she had by her husband *Buggins*; and the plaintiff, after the death of *Yates* the second husband, entered by virtue of that devise; and by his bill he claims under the will of *Mary Yates*, so that he admits she had a power to devise, which is enough to affirm the right of the defendant.

Besides, there is another thing to be considered in this cause, (*viz.*) *Mary Buggins* the widow of the testator, upon her intermarriage with *Yates*, reserved a power to dispose this estate as she should think fit, notwithstanding her coverture, and after the said marriage, she devised it to her husband *Yates* for life as aforesaid, remainder in parcels to her three sons and their heirs; *provided that if any, or either of her sons died under 20 years, and without issue, that the share of him or them so dying, should go to the survivor or survivors.*

Now *John Buggins* one of her sons died under twenty years, and without issue, so that the lands which were devised to him must descend to the plaintiff and the defendant equally; for this being a common contingency, and having happened, whether it is by limitation of an use, or by executory devise, the remainder over is always good.

The court was of opinion, that this could not be an executory devise, because the testatrix was a feme covert; but the defendant's counsel pressing for an inquiry into the value of the personal estate of the Testator *Buggins*, tho' it seemed hard to grant it after such a length of time, * unless there was a very great surplus; yet an * P. 124. account was directed to be taken thereof, and that all the deeds and writings concerning this estate should be brought before the Master; and the consideration of this remainder over should be reserved until the account of the personal estate was taken; and then it would appear what right the testatrix had to devise all or any part, and what part of this estate.

Sir John Fryar *versus* Vernon.

Where process of this court will not affect lands in Ireland, to sequester them for a contempt.

2 Wms. Rep. 261. pl. 65. Sel. Ch. Caf. 5, 6.

UPON a motion for a *sequestration* of the defendant's estate in Ireland, for a contempt to this court; the Master of the Rolls was of opinion, that such *sequestration* could not be granted, or at least that he would be well advised before he would grant it; for that the process of this court could not affect any lands in Ireland, the practice in such cases being to make *affidavit*, that the person standing in contempt is here in England, and being afterwards taken upon process, the court will oblige him to give bail to abide and perform their decree.

Whitechurch *versus* Whitechurch. Before the Lords Commissioners Raymond and Gilbert.

The mortgagee had a term for 500 years, and afterwards took another term of the same lands for 1000 years in the name of a third person, to commence after the determination

of the first term, in trust for himself; and afterwards he purchased the fee-simple in his own name; and then he devised the said lands to E. G. for life, remainder in tail, &c. This will was void so as to pass the lands, because not attested by three witnesses; but it was insisted that it was good to pass the term of 1000 years as a term in gross, and separated from the inheritance; but decreed that it was a term which attended the inheritance by implication of law; for it is not expressly devised for that purpose, and there is no apparent intention, that the testator designed to pass it as a separate interest. 2 Wil. Rep. 236. pl. 60. Gilb. Eq. Rep. 168. *v. 1. p. 519.*

* P. 125.

* Afterwards by will he devised the said lands to the defendant Whitechurch for life, remainder to his first, and every other son and sons in tail male, and made T. S. his executor, and died.

Now this will was not executed according to the statute, for tho' it was all of the testator's hand-writing, and signed by him; yet it was not attested by three witnesses, as required by the statute; but the executor having assented to the legacy, the defendant was (as he insisted) possessed of the legal estate of this term of 500 years.

However, the will being not good to pass the inheritance, the plaintiff as heir at law to the testator exhibited his bill against the devisee, and against the executor, and against the trustee of the term of 2000 years, to compel them to assign both the said terms to a third

third person in trust, to attend and protect the inheritance for him, that being the only use of such terms for years, as he insisted.

It was argued for the defendant, that the principal point to be considered in this case, is what estate the testator had in him at the time he made this will; and to judge rightly of that matter, some consideration must be had both of the principles of law and equity; now a term attending on the inheritance, is in equity to be considered of no other use than to protect the inheritance, tho' at law it is a separate interest; and if it is only to protect the inheritance, then the testator had no other estate when he made his will, but an *inheritance* which he had chiefly in contemplation, and intended to pass at that time. For the defendant.

It is true, if there had been any express declaration of the testator's intention in this will to pass the term exclusive of the inheritance, there it might pass; but it plainly appears he intended only to pass the inheritance, and there is nothing in the will which necessarily implies a separate devise of this term.

It was said, that where a man is seised of an inheritance, and has an unmerged term in notion of law, and he devises the inheritance, the devisee may in this court compel the executor to convey the term to a trustee to attend and protect the inheritance, because the term is in the executor, upon that trust only, and it is very wrong to affirm, that when the inheritance doth not pass, that the heir at law cannot compel such executor to assign the term.

It was resolved in the case of the creditors of the *Earl of Pembroke* by simple-contract, that they should be paid out of an unmerged term he had in him, because such a term was a chattel * liable to * P. 126. their demands; but if the term had been *in a trustee for the Earl*, it had been otherwise.

So in the principal case, tho' the will is not sufficient to pass the *inheritance*, because it wants that requisite which the statute directs; yet it is sufficient to pass this term to the defendant, who having the legal estate therein, this court will not interpose, and take it from him in favour of the heir who is a volunteer; for it is a rule in equity never to interpose in favour of one volunteer, to the prejudice of another, but to let him who hath the law on his side take advantage thereof, especially where the interest of a purchaser for a valuable consideration doth not interpose; so that upon the whole it was insisted, that this unmerged term in the same person is to all intents as a term in gross, and shall pass by this will as a chattel interest.

Baron Gilbert was of opinion, that this was a *term attending* Curia: the inheritance, and to protect the same from intermediate incumbrances, and that an unmerged term in the same person is in him in nature of a trustee to attend the inheritance; and that it would be very dangerous to all the inheritances in *England*, if unmerged terms should be taken to be *terms in gross* in the owners of the inheritances, and pass as such.

Now

Now in the principal case, if this should be construed as a *term in gross*, then it is such a chattel interest as may pass by this will, tho' all the solemnities required by the statute are not observed, but if it is a *term annexed unto, and attending the inheritance*, it cannot pass by this will in any other manner than the inheritance would pass.

Now it hath been allowed at the bar, that the term for 2000 years is *annexed to the inheritance*, but the term for 500 years is not; but no reason was given why there should be such a difference between these two terms, that one should, and the other should not attend the inheritance; and certainly it can never be said with any colour of reason, that where a mortgagee of a term of years purchase the inheritance, that such term when in himself, and unmerged, shall go and descend in another course different from the inheritance; for it is the constant and uniform construction in this court, that such a term shall be annexed unto, and protect the inheritance, and attend the same; and it would be a dangerous construction in equity to make the inheritance and the term separate and distinct estates in one person.

* P. 127. * The other commissioner *Raymond* differed a little; he was of opinion, that where the testator expressly deviseth such a term, or where it comes to an executor by implication, as a chattel interest, (*viz.*) By a devise of all his chattels; or where it vests in an administrator generally, without making any will; in such cases the heir at law would be proper to apply to this court to have the term assigned to another to attend and protect the inheritance; but that since it is agreed on all hands, that this term passeth at law, it is a question, whether this court can take it from him to whom it is devised, in favour of the heir at law, who is a volunteer as well as the devisee.

It is true, where a term is expressly limited to attend the inheritance, there, tho' the testator likewise expressly deviseth it to another, it will not pass; but where it attends the inheritance only by construction or operation of law, or in an equitable notion, as a term bought in and assigned by creditors, or terms raised for childrens portions, or for other particular purposes; there, if the testator expressly deviseth such terms, they will pass.

But where a man hath a term for years, which by *intendment of law only* attends the inheritance, certainly he hath a power to sever such a term from the inheritance; and if he should assign it to one man and mortgage the inheritance to another, in such case the term shall not attend the inheritance, but it becomes a term in gross; and why should not a man have the like power to do the same thing by will, if he thinks fit.

But there is this farther to be considered in the principal case, that as in this will there is no apparent intention, that the testator designed to pass this term as a separate interest from the inheritance, tho'

tho' there are sufficient words to pass it in general; then, whether such general words shall after the death of the testator, sever this term from the inheritance, which attended and protected it in notion of equity, before such devise was made.

But this point was not debated, for it was decreed that the term did not pass by this devise, which plainly appeared to be of the inheritance only, without any intent to pass the one, exclusive of the other; therefore the court was clear in opinion, that the term should not be severed from the inheritance, and pass to the devisee by the general words of this will, tho' there were sufficient words to pass it, if it had been a *term in gross*, and that the executor of this will was a trustee for the heir at law, and his assent to the legacy was of no effect, but that the term was still in him to perform the trust, which he was obliged to execute. * P. 128.

Then another question was made, and strongly insisted on by the Attorney General, (*viz.*) That the devisee being an infant, the decree should not be final on him, but that he might have leave to shew cause against it within six months after he came of age.

But the court was clear in opinion, that the decree should be final, for that in cases of *trusts* infants are always bound by decrees of this court, and so they are where the will of the ancestor is contested; and it is either set aside or confirmed in equity after trial of an issue *dehors vel non*, or where it is otherwise set aside without a trial at law; and there is scarce any case where an infant hath time to shew cause against a decree, but where it is necessary for him to join in a conveyance in order to compleat the estate, and where such conveyance is of the inheritance, as in decrees of foreclosure of mortgages, &c.

Reeves versus Reeves.

THE case, *ff.* The father of the plaintiff and the defendant, in consideration of his marriage with their mother, and of a portion in money, did, in the year 1673, article to settle his estate to the use of himself for life, then to his intended wife for life, then upon trustees to preserve contingent remainders, then to the first son of that marriage, and to all and every other the sons, &c. *in tail male*, with several remainders over, with power to make a jointure to any other wife of 1000 l. *per annum*; and a proviso, that it should be lawful for him, by and with the consent of the trustees, to sell the estate, and with the money arising by such sale to purchase other lands, and to settle the same to the like uses as in the said deed dated 1673.

Afterwards the father sold the lands, and with the money purchased other lands now in question; and in the year 1692, he settled the new purchased lands, by and with the consent of the trustees in the first settlement, to the use of himself for life, remainder

By marriage-articles the eldest son was made tenant in tail: proviso, that the father might sell the lands by the consent of the trustees, and purchase other lands, and settle them to the like uses; he purchased other lands, but did not settle them to the like uses, yet held good. 1673.

1692.

to the defendant for life (who by the first settlement had an estate-tail) remainder to trustees to preserve contingent remainders; then to his
 * P. 129. * first and every other son in tail male, with several remainders over, with a power to make a jointure to any woman he should marry, of the yearly value of 600 l. and soon after the father died.

1698. Then the defendant, who was his eldest son, in consideration of his marriage, and of a marriage-portion, by deed dated 1698, conveyed the new purchased lands to trustees to the use of himself for life, then to his intended wife for life, then to trustees to preserve contingent remainders, then to his first and every other son in tail male, with several remainders over.

The defendant, Thomas Reeves, having only a daughter, and no issue male by his said marriage, would now sell these lands, alledging, that the remainders limited to the issue male were voluntary, not being within the consideration of the settlement made by him in the year 1698.

Therefore this bill was exhibited by the next in remainder to obstruct the sale, and to oblige the trustees to enter to preserve the contingent remainders; and that the deeds and evidences may be brought into court to know how the title stands, he suggesting, that by the marriage articles of their father, dated anno 1673, he covenanted to settle his estate as aforesaid, but with a proviso to sell the same, by and with the consent of the trustees, and to purchase other lands, and to settle them upon the same uses, as in the first settlement, &c.

For the defendant.

And it was argued for the defendant, that the settlement in 1673, made upon the marriage of the father, both of the plaintiff and defendant, tho' mentioned to be by articles only, was, and is a good settlement by way of covenant to stand seised; and that the defendant is by the express words of that settlement made tenant in tail of the lands sold; and the proviso being to settle the new purchased lands to the same uses as in the first settlement; it was not in the power of his father to make him tenant for life by any other settlement whatsoever, so that he must still remain tenant in tail of the new purchased lands; and that settlement made by his father in the year 1692, when he purchased those lands as far as it crosses the limitations in the first settlement is entirely void, being voluntary; so that the settlement made by the defendant, in the year 1698, upon his marriage, is good, and such of the lands which are not contained in that settlement, the defendant may sell, and the plaintiff hath no
 * P. 130. right to contest the sale, even of * those lands, he being no ways within the consideration of that settlement.

For the plaintiff.

On the other side it was insisted for the plaintiff, that this settlement made by the father, in the year 1692, of the new purchased lands, appears on the very face of it to be made in consideration of the settlement made by him in the year 1673, which tho' mentioned to be by articles, yet strictly speaking, those articles amounted

to a covenant to stand seised; and the settlement made in 1692, being in execution of that covenant, and acquiesced under ever since it was made, must now be taken as a full and entire execution of that covenant; and tho' the father could not be compelled by a court of equity to make the defendant *tenant for life*, who by the first settlement was *tenant in tail*; yet the father having of his own accord, and with the consent of the trustees made this settlement, and no objection made to it during his life, the defendant shall not be admitted to say, it is not good, it not corresponding with the *proviso* in the first settlement.

This is not like the case of *Wakely versus Wakely*, where the father, on his intermarriage, &c. articted to convey his estate to the use of himself and his wife for life, remainder to the heirs of their two bodies, and afterwards he had issue a son, who coming of age, the father by his last will, which he mentioned to be in execution of the articles, devised the estate to his son *for life*, remainder to his first and every other son, &c. in tail male, with several remainders over, and afterwards the son brought his bill in this court to be relieved against this devise, it not corresponding with the articles; and the court declared, that tho' by the equity of the articles the son should be *tenant in tail*; and if he had sued in this court to compel the father to an execution of the said articles, the court would have decreed an estate-tail to him; yet, if the father, by the consent and approbation of the trustees had made such a settlement, this court would never set it aside.

But in that case the father had done it by his last will, without the consent of the trustees, and without the consent of the son, who was then of age; and by that means the son having no power to make a jointure, or any charge on the lands to make provision for younger children, that devise was set aside.

But in the principal case, the settlement in 1692, was made by the consent of the trustees in the first settlement, which * is therefore * P. 131. good, and a full execution of the covenant in that settlement.

And so is *Matthews's case*, who by his father's marriage-articles, was made *tenant in tail*; but some time afterwards the father made a settlement by which *Matthews* was made *tenant for life*, with a power to settle a jointure of 600 l. a year on any woman he should marry; and being about to marry, it was the opinion of several eminent lawyers he could make no greater jointure; for tho' he was *tenant in tail by the articles*, and if it rested there, he might have made what jointure he thought fit; yet being *tenant for life* by a subsequent settlement varying from the articles, he could not make the jointure beyond 600 l. per ann. and thereupon he applied to the parliament, and obtained an act to make up the jointure 1000 l. per annum, but that his estate in possession, and all the remainders over should continue as before.

Eq. Abr. 393.
pl. 4.
Gilb. Eq.
Rep. 113.

Next the counsel for the plaintiff cited the case of *Burton versus Hastings* in this court, which was thus, (*viz.*) By the marriage-articles the wife's estate was to be settled on the husband and wife, and on the heirs of their *two bodies* to be begotten; and afterwards it was settled to the use of the husband and wife during their lives, remainder to the first, and every other son of the *husband* in tail male, remainder to the *heirs of the body of the wife*; they had no son, and but one daughter, the husband died, and his widow married again, and then the husband and wife joined in a fine, and settled the estate to other uses; thereupon the daughter exhibited her bill, and prayed relief on the articles, because by the equity thereof, the husband and wife ought to be but *tenants for life*, and the subsequent settlement could not enlarge the estate of the wife to an *estate-tail general*, (*viz.*) *To her and the heirs of her body*; but she had no relief, the Lord Chancellor Cowper declaring he could not relieve against the settlement, though if it rested on the articles without any settlement made, he would have decreed, that the articles should be carried into execution.

It was farther insisted for the plaintiff, that he was proper in this application, and had reason to pray the aid of this court; and for that purpose a case was cited between *Sir Richard Mead and the Lord Kerry*, which was thus, (*viz.*) The late Lord Kerry, in consideration of a marriage and a marriage-portion, settled his estate to the use of himself for life, then to trustees to preserve contingent remainders, * then to his first and every other son in tail male, &c. and before he had any issue, he borrowed money of the plaintiff, and for securing the repayment thereof with interest, he levied a *fine*, &c. And upon a special verdict found in the cause, the question was, if the charge was good against the present Lord, for that on his father's levying the *fine*, the trustees did not enter to preserve the contingent remainders; so that it is very proper that the plaintiff in the principal case should come into this court to compel the trustees to enter, in order to preserve the contingent remainders, especially since the plaintiff is a purchaser under the settlement made *anno 1692*. for that his father who made that settlement, had thereby abridged his power of charging the estate with 1000 *l. per ann.* which by the settlement made *anno 1673*. he had power to do.

Curia.

Every remainder man hath a right to come into this court, and pray the aid thereof to compel persons to bring in the deeds and evidences relating to the estate; but this is a bill of the first impression as to the prayer for the trustees to enter to preserve contingent remainders, for their title is merely at law; neither doth it appear in the cause, that the trustees refused to enter.

Now if this case is considered upon the deed made *anno 1673*. the defendant is tenant in tail of the lands thereby settled; but the deed made 1692, of the new purchased lands was intended to be a family settlement, and a full execution of the covenant in the deed made

made 1673. by which deed the defendant being made *tenant for life*, he shall not be at liberty to incumber any part of the lands thereby settled by his father; therefore the decree was for the plaintiff.

And in pronouncing this decree, the *Lord Chancellor* said, that where a *settlement* is made by the father, or other lineal ancestor, in consideration of the marriage of his son, in such case all the remainders limited to his children and their posterity are within the consideration of that *settlement*, but when it is made by a brother or any other collateral ancestor on his intermarriage, there after the *limitations* to his own issue, all the remainders limited to his collateral kindred are *voluntary*, and not within the consideration of the *marriage-settlement*.

* Southwell *versus* Lord Limrick.

* P. 133.

THIS was a bill to redeem a mortgage made *anno* 1636. and upon a motion for publication of the depositions, the question was, whether a deposition taken *de bene esse* on a commission formerly issued to examine witnesses, and taken before the defendant had answered, or issue joined in that cause, should be now read at the hearing of this cause, and according to the resolution in * *Brown's case* it ought not.

Depositions taken *de bene esse*, and before the defendant had put in his answer, or issue joined.

The case was thus, *ff.* Upon a bill in the Exchequer to preserve the testimony of witnesses, one T. S. being a witness, and sick, was upon hearing of counsel on both sides, and by order of court, examined *de bene esse* on the part of the defendant; afterwards on the 28th of November, the answer came in, and the witness died on the 18th of December following, and by the opinion of all the judges, it was held, that his deposition could not be read in evidence at a trial in law, in ejectment, because it was taken *before issue joined*, and he lived long enough after the answer came in to be examined *in chief*.

315.
2 Eq. Caf.
Abr. 418.
pl. 7.

Where there is no default in the defendant, a deposition taken *de bene esse* on behalf of the plaintiff, and the witness dying soon after such deposition taken, it shall not be read; but in the principal case that reason fails, for the plaintiff was kept out of the answer by the defendant, for above two years by privilege of parliament, and other delays; and the commission to *examine in chief* was taken out in July last, and by *affidavits* made in this cause, it appears, that this witness who was examined *de bene esse* was on the 15th day of June (before the suing out any commission) struck blind, and lost the use of her memory, and soon after died; but if she had lived, she could not have been examined for the reason before-mentioned; therefore as this delay was occasioned by the defendant, it was insisted, that this deposition taken *de bene esse* might be read at the hearing this cause, and published with the rest of the depositions.

For the defendant.

It was said on the other side, and admitted to be true, that where the delay is made by a defendant, so that a witness cannot be examined *in chief*, he either losing his memory, or dying before he can be examined in chief; in such case, * his depositions taken *de bene esse* may be read; but if the delay is on both sides, they shall never be read against the defendant, because he loses the benefit of cross examining the witnesses.

* P. 134.

Now in this case there was a greater delay made by the plaintiff than by the defendant, for the bill was filed against him, whilst he was in *Italy and Spain*, in his travels, and as soon as he returned in *December, &c.* he put in his answer, which was filed 10 *February* following; and from that time to the 28th of *April*, which is about eight weeks, the plaintiff did not think fit to reply; but as soon as his replication came in, the defendant rejoined, and on the second of *June*, gave commissioners names to the clerk of the other side; but the plaintiff did not join in commission till the 28th day of the same month, so that the greatest delay was on his side.

So where the mother was examined *de bene esse*, and lived eight months after, in which time she might have been examined in chief, but she died without being examined, it was held, that her depositions *de bene esse* should not be read in evidence.

At the same time it was moved, that the publication of depositions *in perpetuam rei memoriam* might pass, and they might be read on the hearing this cause, the witnesses being since dead.

Cum.

It is the work of another day, to determine whether those depositions may be read in evidence or not; therefore no opinion was given as to that matter, but it was ordered that publication should pass, and that if the plaintiff thought fit, he might make this objection in proper time.

* DE

(1.) Whether the father who was a testimony, and was removed by the law, should be examined in chief. (2.) Whether her marriage with the defendant, which is proved by the testimony of the father, and the testimony of the mother, and the testimony of the children, should be read in evidence, and the testimony of the children should be read in evidence, and the testimony of the children should be read in evidence.

* D E

* P. 135.

Term. Paschæ,

11 Georgii. In Cancellaria.

Morgan *versus* Dillon, before the Lord Chancellor
West in Ireland.

UPON a petition to have the three children of *Sir Arthur Shean* removed from the defendant *Dillon*, and to be delivered to the plaintiff, or to some other person whom the court should appoint; the case was thus:

The husband devised his real estate to his three daughters and their heirs, and then by a codicil he devised it to his wife, if his three children should die without issue, and made her guardian to his children, and died; she married again; the guardianship was taken from her by the court.

Jf. Sir Arthur Shean being seised of a considerable real estate, and being likewise possessed of a great personal estate, married the plaintiff *Morgan's* daughter, by whom he had issue three children; and being advanced in years, and his wife a young woman, he devised his real estate to his three daughters, and their heirs, and by his will appointed his wife to be their *guardian*; and he devised 100 *l. per annum* to each of them during their infancy, for their maintenance; and two parts of all his personal estate to his said three children, and the third part to his wife.

About three hours before his death, the said *Sir Arthur Shean* made a *codicil* by which he confirmed his will, but devised his real estate over to his wife, in case his three children should die without issue of their bodies, and soon after died; and about six months after his death his widow married the defendant *Dillon*.

In the argument of this case there were two points very well debated, which, tho' in *Ireland*, yet seem very useful to explain the law concerning *guardians*.

* (1.) Whether this Lady, who was a *testamentary guardian*, was removable by the *Lord Chancellor*.

* P. 136.

(2.) Whether her marriage with the defendant *Dillon* is such an act which will amount to a breach of that trust reposed in her by the testator; so as to render her incapable of such trust, and to be removed by this court on account of the marriage, and the remainder limited to her in fee on the death of the three children, without issue.

(1.) As

For the
plaintiff.

(1.) As to the first point, it was argued for the plaintiff, that this Lady being to enjoy the estate on the death of these children, without issue, it would be dangerous to continue her in the guardianship, especially since she is married to a young gentleman, who, in her right will be guardian to them; and whose children by her will be entitled to inherit this remainder; therefore it is certainly in the power of this court to remove a *testamentary guardian* in cases of such unforeseen accidents.

1 Dom. 270.

The civil law (which the testator understood very well) ought to be the rule in this case; now, by that law, if the mother of infants marry a second husband, the education of her children may be taken from her.

For the de-
fendant.

* 12 Car. 2.
cap. 24.

It was argued for the defendant, that this Lady being a *testamentary guardian*, according to * the statute 12 Car. 2. by which it is enacted, that the parent of a child under age, and not married, may by deed or will dispose the custody of such child, for and during such time as the child shall remain an infant, or for any lesser time to any person, other than a popish recusant; and that such disposition shall be good against any person claiming the custody of the child as guardian in socage, or otherwise; and that the person to whom it is disposed may maintain an action of ravishment of ward or trespass, against any other who shall wrongfully take away or detain such child, for the recovery of the child, and shall recover damages for the use of the child.

And the person to whom it is disposed shall, and may take into his custody, the profits of all the infant's lands, and the management of his personal estate till his age of twenty-one years, or any lesser time, according to such disposition, and may bring actions in relation thereunto, as by law a guardian in common socage might do.

* P. 137.

That this court could not remove such guardian, unless guilty of some misdemeanor, which might render her incapable * of performing the trust reposed in her; and as to the objection, that her second marriage will make her incapable, it is probable it may be so by the civil law, which will not hold in this case, because this Lady was appointed guardian by the will of the father of these children, and by virtue of a statute which gave him power so to do; and the testator, at the time of making his will, saw all the inconveniencies which are now suggested in behalf of the plaintiff; for he must necessarily presume this guardian being very young, would marry again; nor can the presumptions of ill nature, or destroying the infants be applied to a mother, as they might to another, who is next of kin, because it must be presumed, that whatever parents can get will be for the benefit of their own children.

Now, since the testator hath by this appointment in his will, adjudged the mother to be a proper person to be intrusted with the education of her own children, a court of equity will not break thro' such a will, for that would be to make a new will after the death of the testator.

It would likewise be a breaking tho' that power which the subject hath purchased at a great rate, and that is by settling a perpetual revenue of *Tonnage* and *Poundage* on the crown, in consideration of taking away the court of *Wards* and *Liveries*, and turning all the old tenures into free and common socage, and to prevent disputes which might be made, by disposing by will or otherwise, lands held in *Knights-service*, giving men power to dispose the *custody of their children*, during their minority, which is a privilege that cannot be taken from them since the making that statute, which is plainly implied by the words of the statute itself; for power given to parents to dispose their children to any person, except to popish recusants, is an implication, that any other person who is appointed to be guardian by virtue of this statute, cannot be removed by this court.

It is true, where there is a *guardian by the common law*, a court of equity may interpose; but where by the *statute*, it cannot; as for instance; the testator devised the guardianship of his son to his mother-in-law, and died; afterwards the widow married a servant, and being poor, the uncle of the child got the possession of the infant, and sent him beyond sea; but the court ordered him to restore the child to the *guardian*, for that they could neither remove the child or the guardian, but would make her give security * not to * P. 138. marry the infant, without first acquainting the court.

3 Salk. 177.
See 2 Cases
in Chancery
237.

And as a *guardian* is not removable, so the guardianship is not assignable, neither shall it go to the executor or administrator of the guardian, because it is a *personal trust* reposed in him, and therefore not to be determined but by his death.

Bedell versus
Constable,
Vaugh. 180.

(2.) As to the second point it was argued, that the marriage of this guardian did not make her incapable of the guardianship, because (as it hath been already observed) it is a *personal trust* reposed in her, and the marriage cannot be an assignment thereof, because it runs in personal privity; and therefore it cannot be forfeited by the attainder or other misdemeanor of the husband; it is like the case where a *feme sole* was made trustee, or where she hath goods as executrix or administratrix, her marriage is no reason to remove her from such trust or executorship.

Now, if the devise of the guardianship to this Lady should be void, the maintenance devised to her children would likewise be void, and then she would be guardian to these children *by nature*, and certainly her marriage, without some other default, would not have determined such guardianship; and there cannot be any convincing reason why it should be determined by her marriage, now she is a *testamentary guardian*, than it would have been if she had been a *guardian at common law*; for the devise of the *remainder in fee* to her cannot be any objection upon this statute; for at common law, the *Lord as guardian in chivalay*, would have the *wardship* of the body and the lands; tho' if the ward had died without heirs, he was to have his lands by *escheat*, in which case it cannot be denied

but the Lord was to have some benefit by the death of the ward, as the guardian is to have in the principal case, if her children should all die without issue.

The limitation of such a remainder to a *guardian* would have been no objection at common law to remove her from the guardianship, for if it should, it must arise from a presumption, that the guardian may destroy the child; but in this case neither the testator, nor any other person could, or can presume that the mother would destroy her own children; but any man might imagine she would marry again, being young and in the prime of her youth.

* P. 139. Now, the reason of *removing a guardian at common law* is, because the guardianship might be cast on one who is worth * nothing, or an *idiot* or *madman*; and therefore it was reasonable that this court should interpose and grant relief to the infant by appointing a guardian who might educate him suitable to his degree and quality; and this statute was intended to remedy those inconveniencies by giving the parents power to ascertain the person, and to appoint such a person to be guardian to their children in whom they could best repose that trust, which appointment is not like a *bare power*, but it is coupled with the the greatest *interest* which a parent hath in his children; therefore such a guardian is not to be removed by this court.

Curia.

There are two points in this case.

(1.) Whether this court can remove a *testamentary* guardian.

(2.) As this case is circumstanced, whether there is a sufficient foundation for this court to remove those children from the custody of the defendants, if they are removeable at all.

32 H. 8.
cap. 46.

At common law before the statute 32 H. 8. by which the court of *wards and liveries* was erected, the Lord Chancellor was the sole judge of *wardships*, but with this difference, that where they were *lucrative to the crown*, there the *Lord Treasurer* acted, who had a concurrent jurisdiction with the *Chancellor*; but where *wardships* were not *lucrative to the crown*, but only for the benefit of the *ward*, there the *Chancellor* alone had the disposition and management of the ward; therefore as the law now stands, the *onera feudorum* being extinct, and the court of *wards* abolished, and all the *old tenures* being turned into *free and common socage*, all *wardships* which are beneficial for the wards must return to this court, as to their original fountain.

Cases in Chan.
2d Part 136.

It is true, there were some statutes which altered the common law as to the persons of *wards*; as for instance, a *guardian in socage*, or in *chivalry*, had the custody of the person at common law; but by the statute of * Ed. 6. it appears, that the father of any maid or woman-child unmarried, and within the age of sixteen, might by his last will

* 4 & 5 E.
6. cap. 8.

will and testament, or by any other act in his life-time, appoint, assign, bequeath, give, or grant the order, keeping, education, or government of such maid, or woman-child, but not of the males, probably, because the females are more exposed to contingencies than the other.

* That statute related only to the persons of infants, but the *statute of + wills* relates to their lands; for whereas before that *statute* ^{* P. 140.} a guardian in socage had the custody both of the person and lands ^{+ 32 H. 8. cap. 1.} of the ward; now by that statute, the father had power by his last will and testament, or by any act lawfully executed in his life-time, to dispose all his lands held in socage at his free will and pleasure.

And by virtue of that act, fathers did usually devise their *socage* lands by will to some persons in trust, for the heir during his infancy; and by this means the *guardian in socage* perceiving there was no benefit to be had by the guardianship very often declined it; so that the heir was without any *guardian*, which being a very great inconveniency was intended to be remedied by the aforesaid *statute 12 Car. 2.* which gave the father a power either by deed, or will, to appoint a guardian; but this was only as to the *modus habendi*, for it gave the guardian (thus appointed) no new authority, which he had not before; it doth not describe his power, but explain its prevalency against *guardians in socage*, who were the next of kin, to whom the inheritance could not descend, and who claimed the guardianship before this *statute* was made.

The spiritual court might appoint a guardian to an infant, who had only a personal estate, but where he hath such an estate, and also lands, such an appointment is void; this court might likewise appoint a guardian, where there was not a rightful one before, and even where there was a real, as well as a personal estate; and could remove such guardian, though made by the appointment of this court, if he afterwards became not fit or improper to be a guardian; but a *rightful guardian* was not removeable *ad libitum*, as guardians appointed by this court, or by the spiritual court might. ^{2 Lev. 162. Bishop of Carlisle ver. Wells.}

A *statute guardian* may be likewise removed for a just cause, and for this there is a plain authority in *Sid. 424.* which was but nine years after the making the *statute*; and contemporary expositions have been always thought the best method of explaining the meaning of *statutes*; now in that case, it was held, that a *statute guardian* might be removed, which shews, that it hath been admitted even in a court of common law, that a *testamentary guardian* is under the control and inspection of a court of equity, as superintendent of all guardianships; and in the case of *Foster versus Denny*, * this ^{* P. 141.} court ordered a guardian to give bail; and if such an order is good, it may compel him to do any other act which may be thought necessary for the benefit of the infant. ^{2 Chan. Cases 237.}

At common law there were four sorts of guardians, and every one of them removeable, (1.) There was a guardian by nature, and this was the father who is the root out of which all other guardians spring;

* *Hardes* 96. Spring; and there are instances, where the * father hath been removed from the guardianship of his child, or hath been compelled to give security for the benefit of the infant; and if so, then certainly a *derivative guardian* may be removed, for he can have no greater privilege or immunity than a *primitive* and original guardian from whom he derived.

And even a *guardian in chivalry*, who at common law had the *wardship* both of the *body and lands* of the ward, might be removed by this court for any misbehaviour or ill usage of the person of the ward, because a guardian never had any interest in the body of an infant, but for the benefit of such infant; and whenever he misused that interest, this court could remove the person out of his custody; it is true as far as such wardships were *lucrative*, the guardians as they had an interest by the law, did enjoy the same without the interposition of this court.

There was likewise at common law a *guardian in socage*, which was purely for the benefit of the infant, and accountable to him, and removeable by this court upon any misbehaviour, or obliged to give such security to account as the court thought proper; there was also a *guardian by nurture*, and this was the mother, and she was removeable as the father, and for the same cause, and so was a *testamentary guardian*.

The next question may be, whether there are grounds in the present case to remove this *testamentary guardian*.

Now as to that matter, it hath been rightly observed at the bar, that this petition is brought *quia timent*; but in this case, as well as at common law, there is a difference between a wardship as it works upon the person of the ward, and as it works on his estate; for that which operates on the person, must be helped by anticipating the evil, and in such case a remedy is to be sought *quia timent*; for there can be no reparation *ex post facto*, but as it operates on the estates of the wards, a reparation may be made, and an application is proper in this court *ex post facto*; nay, that is the only time for that purpose; as for instance; * the † father of an infant being indebted to the defendant, granted the guardianship of his children to him (the defendant) with a covenant in the deed not to revoke it; the bill was to bring the guardian to account, and to remove him; but because there was a just debt due from the father to the guardian, the court would not restrain him from receiving the rents of the infant's estate, but only from abusing his person.

Now, if this court can interpose in any case, where there is a *testamentary guardian*, why not in this, if it is thought necessary so to do? the proposition is general; either a guardian can, or cannot be removed at all; that he cannot is false, if he can in any one case; and that it can in some cases hath been already proved by the authorities cited; therefore it may be done in this case.

* P. 142.
† *Lecone ver.*
Shiers, Vernon
442.

It is true, here is a remainder limited to the mother, and it must be admitted, that at common law this was a good objection to remove a guardian in socage, upon a presumption, that such a guardian who was the next of kin might destroy the ward; but such a presumption could never prevail in the case where a *parent* was guardian; for it would be a monstrous presumption, that a man should destroy his own child to inherit his estate; neither can the want of good nature be presumed in this Lady towards her own children, so as for any man to imagine she could be guilty of such an act.

But she is married, and under the control of her husband, who in her right will be guardian, and his children by her will inherit those lands, if the children by her first husband should die without issue; and how can the mother shew her affection or good nature to those children who hath nothing for them, but what is under the power and control of her husband, and who in reality is guardian, which certainly is going out of the will, and what the testator never intended?

Therefore it was decreed, that those children should be removed from the mother their guardian, and that the court would appoint some proper person amongst their relations to receive them; but that the mother should be at liberty to see them as often as she would, and as to the guardianship of the lands, there was no decree made, because there was another bill depending as to that matter; but the Chancellor declared, that a person bred to hardship and penury, and who afterwards makes his own fortune, and keeps it, is more likely to deal fairly with infants, than one born to an estate, and who becomes necessitous by squandering it away; for * such persons * P. 143. rarely retrieve their fortunes, but are always necessitous.

Webber *versus* The Earl of Montrath.

TENANT in tail (remainder in tail to the defendant) made a lease for ninety-nine years, determinable on three lives, with a covenant that the lessee should *renew*, &c. and afterwards he mortgaged the lands to T. S. in fee, who assigned the mortgage to one Flower. If there was no legal tenant to the præcipe, in order to suffer a common recovery; yet after length of time it shall be presumed, that there was a legal tenant. 2 Eq. Cas. Abr. 693. pl. 3. /.

Afterwards the lease for lives (which was prior to the mortgage) being determined, the said tenant in tail made a new lease to the now plaintiff, pursuant to the covenant in the first lease, and then he and the assignee of the mortgagee joined in a conveyance of the equity of redemption to one Alcock, in order to make him a *tenant to the præcipe*; and thereupon a *common recovery* was suffered, in which the tenant in tail was vouched, and he vouched over the common vouchee, and soon after died without issue.

Then the defendant, the *Earl of Montrath*, got this mortgage to be assigned to one *Geering*, in trust for himself, and brought an ejectment on a double demise by him and the said *Geering*; and thereupon the plaintiff exhibited this bill to stay the proceedings at law, and having got an injunction, a motion was made to dissolve it upon coming in of the answer; but the counsel for the plaintiff insisted, that it might be continued on the equity confessed in the answer, it appearing that the assignee of the mortgagee did join with the tenant in tail in the conveyance to *Alcock*, to make him a legal tenant to the *præcipe*; and tho' it was objected, that this remainder to the defendant could not be barred, because there was no legal tenant to the *præcipe*; yet it was insisted for the plaintiff, that this recovery being suffered in the year 1702, which was now more than twenty-three years past; if he could not shew that there was a legal tenant to the *præcipe*, it must be presumed in his favour (as a purchaser) that after such a length of time there was such a legal tenant.

And if this may be presumed, then the mortgagee, who is a trustee for the mortgagor, and he joining with the *cestui que trust* in suffering this recovery, it shall be a bar to all remainders; and this is proved by the cases cited in the margin, where it was held, that a recovery suffered by *cestui que trust* in tail barred the intail and all the remainders, and that such a recovery shall have the same effect in a court of equity, and bind the trust in the same manner as it would the estate in law, in case he had the legal estate in him; and as to a fine it had never been doubted of late; and that even a bargain and sale enrolled by *cestui que trust* of an estate-tail should bind the issue, because such trust is not within the statute *de donis*.

The counsel for the defendant insisted, that the plaintiff ought to give a judgment at law, with a release of errors, otherwise the injunction ought not to be continued, for that the defendant being tenant in tail, it would be of some advantage to him to have the legal estate; so as he might dock the intail, and avoid all the remainders over; and then the plaintiff may have the benefit of his title in equity, and make the most of it.

None of the cases cited at the bar come up to the present case; for in all those cases the trust covered the whole estate of the *cestui que trust*, as well as of those in remainder; it is true, the case of *Basket* and *Peirce* is somewhat like it, which was thus: *¶* The testator devised his lands to trustees for ninety-nine years for the payment of his debts; and if they did not act, then he devised the lands to *T. S.* and his heirs in trust to pay his debts, and afterwards to *A. B.* in tail, remainder in tail to *E. G.* Afterwards *A. B.* who was the *cestui que trust* in tail, levied a fine, and died without issue, and five years passed without any claim; it was decreed, that this fine and non-claim barred the remainder-man in tail, for equitable rights are bound by fines as well as actions and titles at law; and tho' it was insisted

† The mort-
gagor.

† 2 Chanc.
Rep. 78.
Vern. 13, 226,
440.

* P. 144.

Econtra for
the defendant.

Curia.

* Vern. 226.

insisted for the plaintiff in that case, that the title of the remainder-man was not yet commenced, because the debts were not paid, and the term for ninety-nine years was subsisting; and that the entire estate at law being in the trustee, he ought to have entered; and that it was against equity for him to suffer the *cestui que trust* to be barred by a fine and nonclaim thro' his default; yet the court was still of opinion, that the plaintiff was barred.

It is true, in the principal case the mortgagee in fee was a trustee for the mortgagor, but he is only so far a trustee as he derives under the title of the mortgagor, and hath no relation to the remainder over; and to say that the remainder of a legal estate shall be barred by a recovery suffered by a *cestui que trust* of a particular estate is going farther * than ever that point hath been carried; and seems * P. 145. to cross the intention of the statute *de donis*, for by that statute this remainder is vested.

Besides, this recovery was suffered by a *cestui que trust in tail*, which is but a particular estate, who at that very time had it in his power to have the legal estate, by paying off the mortgage.

It hath been objected, that there was no good tenant to the *præcipe*; but if there had not, it ought to be presumed that there was a good one after this length of time. 3

It is true, it induces a strong suspicion, that the defendant, who is the remainder-man, thought himself barred by this recovery when he brought the ejectment, and declared on a double demise, the one made by himself, and the other by the assignee of the mortgagee, which titles cannot stand together; for if his remainder is good, his title under the mortgage is not; and it is plain, that the plaintiff hath a right to be relieved against any right the defendant can claim under the mortgage; therefore as to that a perpetual injunction was decreed for the plaintiff; but as to the defendant's title under the remainder, a trial at law was directed, and after the trial an injunction was ordered till the hearing this cause.

Term. Sanct. Trin.
11 Georgii. In Cancellaria.

Winter *versus* Bermingham.

THE case, *ff. Peter Brown* being possessed of lands for a long term, which he enjoyed twenty-seven years, by his last will declared, that this term was taken by him in trust for the defendant *Bermingham*, to whom he devised the remainder thereof unexpired, and declared that it was in pursuance of the said trust, and soon afterwards died.

Thereupon the plaintiff exhibited a bill in this court, suggesting, that both the testator and the defendant *Bermingham* were *papists*, and consequently by the statute made against the growth of popery, were incapable to take this term; and therefore he being the next protestant heir, prayed that the residue of the term might be assigned to him.

And in arguing this case, it appearing that the testator, *Peter Brown*, had enjoyed these lands for twenty-seven years, and until the time of his death, the court would not intend this to be a trust, and therefore decreed for the plaintiff, with an account of the profits since the filing the bill.

But it was insisted for him, that the account of the profits should be from the time this will took effect, as it was resolved in the house of Lords between *Blake* and *Blake*, (*viz.*) That a papist must be accountable for the profits since the time of the original purchase.

* *Sed per curiam*; that decree was made upon some extraordinary circumstances, but that the present decree should be according to the precedents in this court; and denied to give the plaintiff costs, for that it was hardship enough for him to lose the lands.

D E

Term. Paschæ,

11 Georgii. In Cancellaria.

Lords Commissioners Raymond and
Gilbert, present.

Boothby *versus* Matthew Vernon.

UPON a bill in Chancery to set aside a conveyance which was obtained by fraud, and for a reconveyance of the estate, the case was:

Where a man shall be tenant by the curtesy of England, or not.

ff. Sir Harry Boothby by his last will devised the lands in question to his sister * *Anne Boothby and her assigns for her life; and that if she married and had issue male of her body living at the time of her death, then to such issue male, and to his heirs males for ever; but if she died, leaving no issue male at the time of her death, then to George Boothby and his heirs for ever.*

* She was his heir at law.

Sir Harry Boothby soon after making this will died without issue, and the said *Anne*, who was his sister and heir, entered, and married with the defendant *Vernon*, by whom she had issue a son and a daughter; then *Anne* died, and afterwards the daughter died, and the son survived, who afterwards died, and the plaintiff *Mr. Boothby* is heir at law, both to the said testator and *Anne*; but the defendant and one *Young* an attorney, fraudulently obtained a conveyance of this estate, which was of the value of 700 l. *per ann.* in consideration only of 50 guineas.

Upon hearing the cause before the *Master of the Rolls*, he decreed that the defendant should reconvey all his right to the said lands to the plaintiff, and that the conveyance which he had thus obtained by fraud, should be cancelled and destroyed.

And now upon a petition for a rehearing before the Lords Commissioners *Raymond and Gilbert*, it was insisted for the defendant *Mr. Vernon*, that tho' he took this conveyance, knowing it to be fraudulently obtained by his attorney, and so was guilty of imputative fraud; yet that cannot be any ground to take away any right

* P. 148. from him, which he had before that conveyance * was executed; and a right he had, (*viz.*) to be *tenant for life by the curtesy of England*, because his wife was seised of the inheritance during the coverture: it is true, it is determined by her death; but it is not necessary the estate should continue after her death, to make the husband tenant by the curtesy, if she was seised of the inheritance in her life-time, which by possibility might have continued after her death.

Devise to the wife for life, remainder to the issue male of her body, and to the heirs male of such issue male, remainder over; she had issue a son, who died in her life-time, and then she died, but she being heir at law to the testator, the reversion in fee descended on her; decreed that her husband shall not be tenant by the curtesy.

And of such an inheritance she was seised before and after the marriage; for tho' she had an express estate for life given to her by this will, yet there was no immediate remainder which possibly could vest during her life; but the inheritance was limited upon a contingent at her death; and therefore she being heir at law to the testator, it must descend to her till the contingency happen, so that she was seised of the inheritance subject to this contingent; and tho' that inheritance vanished at her death, yet her husband shall be tenant by the curtesy.

But if not, yet he hath some other rights to this estate; as for instance; his son might take the reversion in fee by purchase under this will; and if so, then the heirs *a parte paterna* will have a title; but if the son took by descent, it is otherwise; and it is probable, the defendant may have some other demands which he may justly make to those lands; therefore tho' this conveyance was got by his attorney by fraud, and this may be a fault in him by imputation; yet there is no reason to oblige him to reconvey all his right to the plaintiff.

Therefore the fee descending on her, even before she married, or had issue, and her estate for life being not merged by the descent of the fee, her husband shall be *tenant by the curtesy*: and so is the case of * *Plunket versus Holmes*. Co. Rep. 66. b. *Archer's case*, *Loddington v. Kyme*, 3 Lev. 431, 432, 433.

* 1 Lev. 11.
2 Sand. 380.
Wil. Rep.
305.

" *Carter v. Barnardiston* was exactly the same case as *Loddington v. Kyme*, which received the same determination in the house of lords.

4 Mod. 284.
2 Lev. 39.
3 Keb. 11.
pl. 15.
3 Salk. 299.
pl. 5.
2 Saund. 388.
Pollexf. 481.

" All which cases plainly prove that the reversion or fee-simple does descend to the heir at law, tho' there is an *Hiatus* or opening for the interposition of the contingent remainders when they happen. In the case of *Puresfoy v. Rogers*, the fee descended to the heir till a contingency happened. By the descent of the fee to the devisee *Ann* she was seised of the fee; and whenever a *feme* is seised of a fee-simple at any time during marriage, and has issue and dies, her husband shall be tenant by the curtesy, even tho' she be afterwards disseised, or the same land be recovered against her. Whether the fee-simple descended to the heir at law was

" the

“ the very question in the case of *Carter v. Barnardiston*. It will
“ be something odd if the husband should not be tenant by the
“ curtesy, since the plaintiff claims these lands in virtue of the seisin
“ in fee of *Ann Boothby*.

So that this decree being, that the defendant shall reconvey generally without reserving to him that estate for life, which he had by the curtesy, for that reason it ought to be reversed.

* There is another reason likewise why it ought to be reversed, * P. 149.
and that is, it being a point of law, whether the defendant is *tenant by the curtesy*, or not, that point ought not to be determined in a court of equity without a trial at law.

It was insisted for the plaintiff, that a reconveyance was absolutely necessary, because the plaintiff can never recover (having conveyed the legal estate to the defendant) until he have a reconveyance, and it is not sufficient to set aside the deed as fraudulently obtained; for if the plaintiff should bring his action at law, and the defendant should give this deed in evidence, it cannot be avoided by pleading the fraud, and giving that in evidence, so that a reconveyance being necessary, the question will be what sort of conveyance.

Econtra.
York Attorney General
for the plaintiff.

And certainly it must be a reconveyance without reserving any estate for life to the defendant as *tenant by the curtesy*; for though it is a point in law, whether he is so or not; yet the court who made this decree did not determine it without referring it to the court of common pleas, for the opinion of the judges of that court, and they certified that he was not *tenant by the curtesy*; however, though it is a point in law, it is a point incidentally arising on a cause proper for the jurisdiction of a court of equity, and such points have often been determined in this court.

Now after a question in law, referred to the opinion of the judges, is by them certified to this court, it is very unusual to speak to it again upon the same head; for if that should be allowed, it would be in vain to refer cases in law to the judges for their opinion, and to certify to this court what the law is.

It is true, in the great case of the *Duke of Norfolk*, the *L. Chancellor Finch* decreed against the opinion of the judges; and in the case of *Gore versus Gore*, the *L. Chancellor Macclesfield* did order the point, certified by the judges, to be spoke to again before himself, upon some dislike of the judges certificate; and his reason was, to give an opportunity, that the matter might be finally determined by appeal to the house of Lords; but the parties agreed.

See ante 4.

Now as to the point in law, it is clear that the wife had but an estate for life by this devise, and that the reversion in fee descended on her; and then the question is, if that is such an estate in possession, that the husband may be *tenant by the curtesy*; and it was argued, * P. 150.
that it was not, for it must be executed in possession, otherwise the husband shall not be tenant by the curtesy; as where an estate is given to two sisters and the heirs of their bodies, the husband of her who dies

Where the husband shall not be tenant by the curtesy.

2 Roll. Abr. 90. dies first, shall not be tenant by the curtesy, because the estate of the surviving sister intervenes.

“ *Co. Lit.* 183. a. Anciently the reversions of estates depending upon contingencies were adjudged in abeyance: as if a lease for life be made, remainder to the right heirs of J. S. the fee-simple was held to be in abeyance till J. S. died. *Co. Lit.* 342. b. But of later years it hath been resolved, that there shall be some kind of descent in the mean time, till the contingencies happen; yet so as not to destroy them. *Plunket v. Holmes*, *Lev. Rep.* 11, 12. The reversion cannot descend in possession, and consequently the husband cannot be tenant by the curtesy.

Now here the testator having devised an express estate to his sister for life, and limited contingent remainders upon her death, the fee not being vested in possession in any body must remain in himself; as where a feoffment is made to T. S. for life, remainder to the right heirs of W. S. in such case if tenant for life dies before W. S. he who made the feoffment, shall have the fee; and it was the constant rule, that where the reversion came to the tenant for life, by the same conveyance, there the estate for life was not merged; but if it came by operation of law as by descent, or by any different conveyance, there it is merged, and so are the cases of * *Wood and Ingersole*, and * *Vent.* 345. *Harrison versus Bell*, &c.

Curia. Upon the death of the wife, the contingent estate-tail to her issue began, so that at that time the estate was to commence in possession, and be consummate, because her estate for life, by which it was to be supported, was gone, so that the inheritance being never vested in her during her life, for that reason her husband cannot be tenant by the curtesy.

And to make this more clear, the intention of the testator is to be considered; now it doth not appear, that he had any manner of intention; that his sister should have any benefit of the inheritance, if he had, then certainly he having the whole dominion over his estate, and who could have molded it as he thought proper, would have shewed, that he intended she should have the inheritance; but there is not the least sign or badge of any such intention; and if it shall be otherwise intended by operation of law, that would be an injury done to the intention of the testator.

* P. 151. Where-ever the estate is to be determined by express limitation or condition upon the death of the wife, there the husband shall not be tenant by the curtesy; as where an estate for life is limited to a woman, remainder to her first, and every other son in tail male, remainder to the heirs of her body, remainder to her right * heirs; here it is plain, that she is seised of the inheritance; yet if she hath a son, her husband shall not be tenant by the curtesy, because the contingent estate, which is to arise upon her death intervenes between her estate for life and the inheritance.

Agreeable

Agreeable with the case before-mentioned is the year-book 1 Ed. 3. 14, 15. which is tenant for life, remainder in fee, &c. The tenant for life made a lease to him in remainder for so many years, as he (the remainder-man) should live; then *tenant for life died*, and *so did the remainder-man*; it was adjudged, that his wife should not be tenant by the curtesy, because the possibility which the tenant for life had, that the estate might revert to him, had barred her of all right of dower. 45 Ed. 3. 15.

For these reasons the decree was affirmed without any allowance on account of the tenancy by curtesy; and as to any other legal interest the defendant had, he might assign it to trustees, *but not to be given in evidence till the plaintiff recovers against the defendant*; and as to any equitable demand, that may be affected by this decree, that the defendant shall reconvey without prejudice to such right.

Charles & al' *versus* Andrews.

THIS was a bill brought against the heir and executors of *John Andrews* deceased, by the plaintiffs, who were his creditors on simple contract, for an account, and to have their debts paid. Articles for the sale of an estate were decreed specifically to be performed.

The case was thus: *ff.* The executors of this *John Andrews* had paid away his *personal assets in satisfying debts by specialty*, which were a *lien* at law on his *real estate*; and by the constant course of this court, where such debts are discharged out of personal assets (as these were) in case of the lands, then the creditors by *simple contract* shall stand in the places of the creditors by *specialty*, to have their debts satisfied *out of the lands*; and so it was decreed in this case, and that the lands should be sold for that purpose; and the heir, who was an infant, to join in a conveyance within six months after he comes of age.

But as to the sale of the lands another question did arise, and that was, that the widow of the said *John Andrews* might keep to that jointure which was settled on her before marriage, and relinquish her dower, or at least be obliged * to chuse one, and to relinquish * P. 152. the other, and that she might not have both; for tho' the jointure which she had by her marriage settlement is not expressed to be in bar of her dower, yet it is the rule of this court, that she shall not have both.

The court was of opinion, that if she was a party to the settlement, and of age at the time of her marriage, and it is expressed that her jointure shall be in bar of her dower, then she shall be barred; but if it is not so expressed, it shall never be averred to be in bar of her dower; and so is *Vernon's case*. Curia.

And so was the case of *Lawrence and Lawrence* in the house of Lords, anno 1717, where it was so held, tho' the settlement was

4. Co. 1. but it seems to contradict the position here advanced.

Dower is not to be barred, but by an express intention.

in consideration of a portion in marriage; but it did not appear the parties intended it should be in bar of dower, which is a different consideration from that of a marriage-portion; therefore nothing but a plain and express intention of the parties shall bar the right of dower.

It is true, this court hath gone so far as to confine a widow to her election which to take, where a term for years was settled on her in jointure in bar of her dower, tho' no chattel interest can bar her dower at law, or within the statute; but in regard she expressly consented to accept such an interest for her jointure, this court would not admit her to have both.

Then it was insisted for one *Atkins*, who was a creditor, by articles made between him and the said *John Andrews*, for the purchase of part of his lands, that if the creditors upon simple contract shall now stand in the places of the creditors by specialty, that it may be without prejudice to his demand, and that he might have a specific performance of the articles.

Extravagant bargain not to be carried into execution in a court of equity.

It is true, the said *John Andrews* sold the same lands to one *Cropp*, but after the articles were executed for sale thereof to the said *Cropp*, he gave the vendor 700 l. for leave to relinquish his bargain, and thereupon those articles were made void; by which it appears that it was a very extravagant bargain, for otherwise so great a sum would not have been given to relinquish it; and it was insisted on behalf of the defendants, that an extravagant bargain ought not to be carried into execution in a court of equity,

* P. 153.

To which it was answered, that *Atkins* the purchaser, under these articles, would likewise relinquish the same upon the * payment of the 700 l. to him; for since *John Andrews* had got so much money by *Cropp*, it was but just that *Atkins* should have that money, or a specific performance of his articles; and the court was of that opinion; but in regard the defendant was a minor, and by consequence could make no election,

Therefore the court decreed a specific execution of the articles made between *Andrews* and *Atkins*, for that the sale thereof by virtue of those articles, and in consideration of so much money to be paid for the purchase, was a separate and *specific lien* on those lands, and this by the constant course of this court, and for so much of the purchase-money to be paid as the lands shall fall short to answer the said *Atkins*, he shall come in as a creditor by specialty on the other lands.

Therefore it was decreed, that all the lands not settled in jointure, or which might be in dower to the widow, should be forthwith sold, and that the infant should join in the conveyance within six months after he should be of age, and the Master to take an account of all the debts, and that the same shall be paid in proportion; and if the lands now to be sold shall not be sufficient to pay all the debts

Term. Pasch. 11 Georgii, in Canc.

debts, then the reversion of the widow's jointure or dower shall come in aid thereof, to satisfy what shall remain unpaid.

Soley versus Salisbury.

A Bill was exhibited by the creditors of a mortgagor to have the estate sold for the payment of their debts, pending which suit the mortgagee obtained a decree to foreclose the mortgagor of the benefit of redemption. Pending a suit by the creditors against the mortgagor to sell, the mortgagee got a decree to foreclose.

The court decreed, that the plaintiff should redeem upon payment of the principal and interest, and costs, to the mortgagee, and referred to a Master to take an account thereof, and that the land should be sold to pay the creditors. Curia.

* *Adams versus Clerke.*

* P. 154.

THE case was, (*viz.*) The testator devised several *specific legacies* to several persons, and in particular he devised specific legacies to each of his grandchildren, to be paid at their respective ages of twenty-one years, or days of marriage, which should first happen; and by a subsequent clause in his will, he appoints, that all the legacies thereby devised shall be paid *within one year* after his decease. Contradictory clauses expounded in a will, so as to make all consist.

Now the grandchildren, tho' under age, and unmarried, exhibited their bill, and insisted, that by virtue of this last clause in the will, their legacies ought to be paid *within a year* after the death of the testator.

The subsequent clause in this will, which seemingly contradicts the payments of the legacies to the grandchildren in point of time, must be construed so as it may not be repugnant to any former clause in the same will, and therefore that last clause must only relate to the other specific legacies given to the other legatees, and not to the legacies devised to the grandchildren. Curia.

Hill

Hill *versus* Filkins, and his Wife.

Bill by a protestant heir to recover lands devised by a papist in trust.
2 Wil Rep.
6. pl 3.
10 Mod. 481.
536.
Sel. Caf. in Chanc. 22.

J.C.

THIS was a bill exhibited by a *protestant heir* for the recovery of lands devised in trust for a *papist*; the case was as followeth: *Jf. Anne Stephenson*, who was grandmother both to the plaintiff and to the defendant's wife, by her last will, *anno* 1716. devised the lands now in question to one *Eyre* and *Busb*, both papists, in trust, to be sold for the payment of her debts and legacies, and the residue of the money arising by such sale, she devised to the wife of the defendant, when she should attain her age of twenty-one years, or be married with the consent of the said trustees, and appointed them to be her guardians, and soon after died.

The said guardians sent the plaintiff, who was then very young, to a popish school in *Suffex*, and the defendant's wife to another popish school in *Hammersmith*; but *Roger Hill*, their father, who was their guardian by nature, petitioned the *Lord Chancellor Cowper*, to have the guardianship of his children, or some other protestant, who should be thought proper; and accordingly an order was made, * P. 155. that they * should be educated in some protestant school; but before that order could be executed, the defendant intermarried with one *Filkin*, at the chapel of the *Emperor's* resident by a priest, and two days afterwards by a minister of the church of *England*.

The defendant confesses by her answer, that she was a papist at the time of making the will, and at her grandmother's death, and for plea saith, that the plaintiff was then a papist; and that she was at that time under the age of eighteen years, and that before she came to that age, she intermarried with the other defendant *Filkins*, who was then, and now is a protestant; and that she herself became a protestant, and conformed within six months next after she came to the age of eighteen years, according to the statute in that case made and provided: the words of which statute are thus:

11 & 12
Will. 3. c. 4.
Parag. 5, 6.

ff. After 29 September 1700, Persons educated in, or professing the popish religion, who shall not within six months after they attain the age of eighteen years, take the oaths of allegiance and supremacy, and make and subscribe the declaration of 30 Car. 2. in the courts of Chancery, King's Bench, or quarter-sessions, shall be disabled (but not their heirs or posterity) to inherit, or in any wise to take any lands, tenements, or hereditaments within this kingdom, and during the said persons lives, the next of kin, who shall be a protestant, shall have and enjoy the said lands until they take the said oaths, without accounting for the profits received, but not to commit waste on penalty of treble damages.

The next clause is, that after the 10th of April 1700. no papist shall purchase mediately, or immediately, any lands, tenements, or hereditaments within this kingdom, or profits out of the same, but all such estates or profits out of lands shall be void.

Then

Then she insisted, that the plaintiff had no right, he being a *papist* himself at the time of the making this will, and at the death of the testatrix.

This being the fact, the single question was, whether this devise of the residue to the granddaughter, shall be accounted as land, and a *purchase* thereof, within the statute; for if it is, then it is void, and the estate will descend to the plaintiff as heir at law.

And as to that point, it was said for the plaintiff, that to devise lands for payment of debts, and the *residue of the * money*, arising by the sale thereof, to be paid to a papist, *this residue* shall be taken as lands, and is a purchase thereof within this act; and therefore cannot be taken by a papist; and so it was resolved in the house of Lords, in the case of *Roper and Ratcliffe*; for otherwise since no body else could have any interest therein, such papist might pay the debts and legacies, and enjoy the lands, and by this means the statute would be eluded, which was made to prevent their taking lands.

The counsel for the defendant admitted, that a devise of the residue (as in this case) was a purchase, and within the second clause of this statute; but yet that the defendant was intitled to have an execution of this trust, for that this statute had two views; one was to hinder papists from enlarging their landed interest; the other was to invite them to conform; and the age of eighteen was accounted a proper period for them to make their election, whether they would conform or not.

Therefore a devise to a papist under the age of eighteen years is good, if he conform within six months after he comes to that age; otherwise the words in the statute, which directs when that conformity shall be made, are in vain, and tho' he did not conform at the time appointed; yet the inheritance vested in him, and shall descend to his heirs, and he shall maintain an action of waste by virtue of the statute against the next protestant heir, who is intitled to take the profits during the disability.

And though the defendant's wife was bred a papist, and professed the popish religion, both at the time of the devise, and at the death of the testatrix, and likewise at the time of her marriage; yet she became a convert before she was of the age of eighteen years, and had done all which is required by the act, and so is capable to take and enjoy the estate.

And the court was of this opinion; and therefore decreed the Curia. trustees to perform the trust.

N. B. On a rehearing before the Lord Chancellor King, the bill was dismissed with costs.

* P. 157. * Robert Barker *versus* Giles and Smith: Friday
4 June.

Joint-tenants
for life, and
tenants in
common of
the inheri-
tance; one of
them died in
the life-
time of the
testator.

S. l. 2 Will. Rep.
280. pl. 73.
Sel. Cas. in
Chan. 17.
See Burn's
Ecclef. Law
554.

THIS was a bill brought by a surviving legatee to have an execution of a trust, in which the case was as followeth:

" Robert Barker seised in fee of the lands in question, by
" will devises all his real and personal estate to, &c. in trust to sell
" the same, and thereout to pay his debts and legacies; and the re-
" sidue (if the same amounted to no more than 400*l.*) to be laid out
" in lands to the use of *A.* for life, remainder to Robert Barker his
" nephew in fee: and the surplus above 400*l.* to be also laid out
" in lands to the use of the testator's nephews Jerom Barker and
" Robert Barker and the survivors and survivor of them, their heirs
" and assigns for ever, equally to be divided between them share
" and share alike.

This will was made *anno* 1716. and about four years afterwards, the testator died, and left a considerable personal estate sufficient to pay all his debts and legacies: but Jerom Barker, one of the legatees, died in the life-time of the testator. And now the plaintiff, as surviving legatee, exhibited this bill against the executors and heir at law of his uncle Robert, to have an account of the real and personal estate of the said testator, and to have conveyance of the real estate.

The trustees by their answer submitted to account, and to execute the trust out of the residue of the estate, after debts and legacies paid.

The question was, how this trust should be executed, for that the heir at law to the testator claimed a moiety of the estate by descent; and this depending upon the construction of this will, what estate the legatees took by this devise; for if it was a *tenancy in common*, and one of them dying in the life-time of the testator, then his moiety will descend to the heir at law, as undisposed by the will: but if they were joint-tenants, then the whole survives to the plaintiff.

Tenant in
common
dying in the
life-time of
the testator,
his moiety

will descend to the heir at law.

The counsel Lutwyth, Cowper, Talbot, for the plaintiff insisted that this was a joint-tenancy, it being in a will where the intention of the testator is to govern, and where artificial reasoning is not to be admitted against it; and that nothing but an express intention, or a necessary implication of such intention shall create a tenancy in common in a will, which would not create such a tenancy in a deed.

" It hath formerly been doubted whether the words *equally to be divided* would make a tenancy in common in a will. 3 Co. Ratcliffe's

" *cliffe's* case is the first case to that purpose. Dy. 25. a. and was
 " resolved by reason of the intention of the devisor; they not being
 " proper words in law for that purpose, for they do not create a
 " tenancy in common in a deed even at this day.

" *Fisher v. Wynne* in *Holt's* time was a devise of copyhold lands to
 " the devisor's two daughters, equally to be divided between them, their
 " heirs and assigns. The court was divided in opinion; but *Holt*
 " held the devise to be a joint-tenancy; for that all the words might
 " be fulfilled by a joint-tenancy, and they do not import a several
 " freehold.

Salk. 391.
 pl. 3.
 3 Salk. 206.
 pl. 13.
 12 Mod. 296.
 Lord Raym.
 622.
 Com. Rep.
 88. pl. 58.

See 12 Mod. 301, 302. Will. Rep. 19, 22. Eq. Cas. Abr. 391. Lord Raym. 624.

" *Blisset v. Cranwell & al.* The reason for which judgment as
 " given in the books (*per Talbot*) does not support it, (*& per Lut-*
 " *wyche*) is not law.

3 Lev. 373.
 Salk. 226.
 Comb. 256.

* Now it is plain these words would not make a tenancy in com- * P. 158.
 mon in a + deed; therefore if such a tenancy is made by this will, † Dy. 25.
 it must be by implication; but express words in the same will shall
 never be rejected, to make room for an implication, as the word
survivor must in this case, if this is a tenancy in common by the
 subsequent words *equally to be divided between them*; it being first
 devised to them, and the *survivor* and their heirs, in express terms.

It may be objected, that if both the legatees had survived the te-
 stator, they would have been tenants in common; but by the word
survivor, the testator intended a provision, that if either survived,
 he should have the whole, and that if both survived, they should
 take by moieties.

Now in this case, the legal estate being in trustees, the heir at law
 can have no pretence, that a moiety descends to him as undisposed;
 therefore by these words in the will the legatees were *joint-tenants*;
 and so it hath been resolved in parallel cases; as for instance; where
 the testator devised lands to *Jane and Elizabeth* during life, *equally*
to be divided, remainder to the right heirs of *Jane*; this was ad-
 judged a joint-tenancy for life. *Trin. 6 An. Twickerman v. Jeffries.*

So a devise to *two, equally to be divided between them, to have and*
to hold to them and the survivor of them; this was adjudged a joint-
 tenancy.

2 Roll. Abr.
 90.

So a devise to his executors, and to the survivor of them, was held
 a joint-tenancy.

So where lands were devised to *two daughters, equally to be divided,*
and to the survivor of them, and to the heirs of the body of such sur-
vivor; this was adjudged a joint-tenancy, and not a tenancy in
 common.

Style 211.

Now by the words of this will, the trustees are directed to con-
 vey the lands to the legatees, and to the survivor of them, and his
 heirs; therefore the heir at law shall take nothing by descent, this
 being an executory trust, and the legal estate vested in the trustees.

There

“ There is a difference between an immediate devise, and an ex-
 “ ecutory trust; for where any thing is executory, the court will
 “ consider the intention.

Farther, by a *devise to two and their heirs*, they are *joint-tenants*; so a *devise to two without saying more*, they are *joint-tenants* by implication: but in this case, the testator hath forbidden such an implication by his comment on the devise in these words (equally to be divided); and the word *survivor* explains his intention to break the descent to the heir at law; and is a conveyance to carry the estate intirely * to the *survivor*; for otherwise that word must be rejected, which could never be the intention of the testator; and this was the opinion of one of the Lords Commissioners.

* P. 159.

Econtra for
the heir at
law.

(a) Cas. Temp.

Holt Ch. J.

370, 371.

11 Mod. 108,

109.

(b) 8 Vin Abr.

265. pl. 7.

2 Vern. 670.

pl. 597. id.

671.

Wil. Rep.

142. pl. 38.

144.

Cro. El. 313.

pl. 5.

2 Wil. Rep.

473. 474.

Wearg Solicitor General, counsel for the defendant, argued, that
 “ there is no difference in this case between an immediate devise,
 “ and an executory trust; for it depends now only on the words of
 “ the limitation. 2 *Chan. Cas. Draper's case*. In 2 *Rol. Abr.* 90.
 “ the limitation is expresse to the heirs of the body of the survivor;
 “ so in (a) *Tuckerman v. Jefferies*, (b) *Bale v. Coleman*, a devise of
 “ lands, tho' executory, was construed in the same manner as an
 “ immediate devise. In that case, after debts and legacies paid,
 “ the residue of the personal estate was to be laid out in purchase of
 “ lands to be settled to the use of *A.* for life, remainder to the heirs
 “ of his body. *Cowper* Chancellor on the first hearing was of
 “ opinion, that in a court of equity this should be considered as an
 “ estate for life, remainder in tail. But *Harcourt* on a rehearing
 “ thought there ought to be no difference in point of construction
 “ between a court of equity and a court of law: to which *Cowper*
 “ afterwards agreed. 2 *Vent.* 365. *Style* 434. As the heir at law
 is favoured in all courts, if any accident in point of fact should arise
 between the inception and consummation of a will (as it did in this
 case, between the making the will and the death of the testator)
 to favour his right, in such case he shall take.

Now it is allowed, that if both the legatees had survived the testator, in such case they would have taken by moieties; therefore if one of them dieth in the life-time of the testator, his moiety shall descend to the heir at law, as undisposed by the will: and as in a devise to two, the word *survivor* is implied, therefore the expressing that word is of no weight; because, if it had not been expressed it would have been implied; but if both the legatees *had died in the life-time of the testator*, then his heir would have been entitled to the whole, and so he is to a moiety; and this was the opinion of the other Lord Commissioner.

“ *King* Lord Chancellor: This devise is to be considered as a
 “ devise of a real estate; the rule of construction of wills in this
 “ court is the same as in the courts of law, *ff.* According to the
 “ testator's intention appearing by the words of the will, as far as
 “ consistent with the rules of law: and every word that can have

Style 434.

3 *Lev.* 373.

“ a construction consistent with law ought to be retained. Had this
“ been an express devise, it had been a tenancy in common, the
“ meaning of the words must be invariable, and cannot be altered
“ by the accident of one of the parties dying; a devise to two and
“ their heirs is a joint-tenancy. If a devise be to *A* for life, re-
“ mainder to *B*. in fee, and *A*. dies living the testator, *B*. shall
“ take immediately. The testator's intent when he made the will
“ was, that the heirs of both his nephews should take: by the act
“ of God here is a determination of his intention as to one: if the
“ devisees are joint-tenants for life, with several inheritances, all the
“ words of the will may be well consistent, which cannot be by
“ any other construction; and if so, the plaintiff will be intitled to
“ the whole for life, and after his death, his heir to one moiety, and
“ the heir at law of the testator to the other moiety, by the lapse.
“ Wherefore he made a * decree accordingly.

* Which de-
cree was af-

firmed in Dom' Proc' with an addition, that the appellant may be at liberty to apply to the court of Chan-
cery for the profits of the real estate, in case the personal estate shall not be sufficient to pay the debts and
legacies.

* P. 161.

** In the House of Lords.*

John Trevor, and other the younger Children of Sir John Trevor, Appellants.

A N D

Edward Trevor Esq; son and heir of Sir John Trevor, late Master of the Rolls, Respondent.

This case was heard at the bar of the House of Lords, Feb. 6. 1719. And was as followeth:

10 Mod. 436.
Wil. Rep.
622. pl. 182.
Eq. Caf. Abr.
387. pl. 7.
14 Vin. Abr.
572. pl. 1.

The marriage articles
23 Octob.
1669, decreed to be
performed.

SIR *John Trevor* by articles dated 23 Octob. 1669, in consideration of a marriage then intended to be had between him and *Jane Puleston*, the widow of *Roger Puleston*, and of the affection he did bear to the said *Jane*, &c. did covenant with *William Salisbury Esq;* and *Sir Richard Lloyd* (trustees therein named) and their heirs, before the end of two years then next ensuing, to settle and assure to them and their heirs, as their counsel should direct, all that the capital messuage called *Brynkinalt*, and other lands therein mentioned in the counties of *Denbigh* and *Salop*, being the antient seat of the family, and all the estate he then had, either in *England* or *Wales*, about the yearly value of 250 l. to the several uses in the said articles mentioned, (*viz.*) To the use of the said *Sir John* for life, without impeachment of waste, then to the use of the said *Jane* for life, and after her death to the use of the heirs males of the body of the said *Sir John*, on the body of the said *Jane* to be begotten, and to the heirs males of such heirs males lawfully issuing; and for default of such issue, to the use of the right heirs of the said *Sir John Trevor*, for ever.

* P. 162.

* And for a farther strengthening the said articles, *Sir John* did thereby covenant, that if the uses and limitations therein were not well raised, according to the intent and meaning of the said articles, that

In the House of Lords.

that he and his heirs would *stand and be seised* of the premises, until such time that a farther assurance thereof should be made, to such use and uses as are therein before declared.

Covenant to stand seised.

The marriage took effect, and *Sir John* had issue by the said *Jane*, the respondent *Edward*, his eldest son and heir, born the 5th of November, 1670, and *John, Arthur, Tudar, Prudentia* and *Anne*, now *Lady Middleton*, the appellants.

But no settlement was made pursuant to the aforesaid articles, and *Sir John* and his Lady (having some prejudice against *Edward*, the eldest son) levied two fines of the lands comprised in the said articles, in the year 1692, unto *Sir John Wynn* and *Edward Vaughan*, and about seven years afterwards, (*viz.*) 29 September, 1699, they did by deed declare the uses of the said fines to *Sir John* for life, then to the said *Jane* for life; and after their death, then to *John* his second son, and the heirs males of his body, with the like remainders over to *Arthur* and *Tudor Trevor* successively, remainder to his two daughters, *Prudentia* and *Anne*, and the heirs of their bodies, remainder to the right heirs of *Sir John Trevor* for ever.

Fines levied in 1692.

Uses thereof declared 29 Septemb. 1699.

And as an inducement to levy the said fines, and to declare the uses thereof, as in the said deed is mentioned, several acts of undutifulness were therein recited, (but none proved in the cause) and also the marriage of the said *Edward* with one *Mary Stains*, against his father's consent (who was proved to be born and bred a gentlewoman, and of a sober and virtuous behaviour) which marriage was not until six or seven years after the said fines were levied; and it was also recited in the said deed, that if the said *Edward* should have the lands comprised in the said articles, then *Sir John* and his Lady would be enabled to make provision for the younger children.

Sir John Trevor, when he executed the said deed to lead the uses of the said fines, was seised in fee of several other lands (which he purchased since his marriage) of the yearly value of 600 l. and upwards; and being so seised, he and the said *Jane*, did by lease and release, and fines levied, settle the same, together with other lands, which * were the inheritance of the said *Jane*, to the use of him- self, and the said *Jane* for their lives, remainder to *John* their second son in tail male, remainder in tail to his other children, as in the former settlement.

* P. 163.
Settlement of the new purchased lands.

Afterwards *Sir John* purchased other estates in fee, which upon his death, descended on *Edward* his eldest son and heir; and also some small parcel of land comprised in the said articles, which were not settled by the deed in September 1699.

The *Lady Trevor* died in August 1704. and *Sir John* died intestate, 20 May 1717. and afterwards some disputes arising amongst his said sons and daughters concerning his real and personal estate, and who should administer, a commission of inspection was awarded; and upon the execution thereof, the said articles were found in a small trunk with some jewels of value, which *Sir John* had deposited

In the House of Lords.

sited in the hands of one *Evan Loyd*, for safe custody; and then *Edward Trevor* the respondent got a copy thereof.

After the death of *Sir John*, his second son *John* entered on the lands comprised in the said articles, under colour of the settlement in *September 1699*. and he and his brother *Arthur Trevor* (who was administrator to his said father) got into their hands all the deeds and writings of all his estate.

Thereupon the said *Edward* exhibited a bill in Chancery in *October 1717*. against all the now appellants and others; and amongst other things, prayed that the said articles might be brought into court, and to have a specific performance thereof, and a conveyance made, as therein mentioned.

The defendants put in their answer, in which *Arthur* the administrator confessed, that the said articles were in his possession; and they all insisted, that the same ought to be considered as a compleat settlement; and that *Sir John* their father had thereby an estate-tail, which by their fines in *1692*. and by the deed to lead the uses thereof in *September 1699*. was docked, and the lands vested in the second son *John Trevor* in tail male, with remainders over; but if the said articles should be looked on as *executory*, and as an agreement for a farther conveyance or settlement, in such case *Edward* the respondent had other lands descended on him from his father of

* P. 164. a far * greater value than those comprised in the said articles, besides his share of the personal estate, which ought to be taken as a satisfaction for the lands agreed to be settled on him by the articles; and for that reason he ought not to have a specific performance thereof.

The decree.

Upon hearing this cause in *June 1719*. the Lord Chancellor decreed, that *John Trevor*, and all the defendants should execute conveyances of all the lands comprised in the said articles, and which were by the deed *29th September 1699*. settled or conveyed to the defendant *John Trevor* (with such remainders over as therein are mentioned) to the use of *Edward Trevor* the respondent, and the heirs males of his body, with the like remainders to *John* the second son, and to *Arthur* and *Tudor* successively in tail male, remainder to *Prudentia* and *Anne*, and the heirs of their bodies, remainder to the right heirs of *Sir John Trevor* for ever.

And as to the other lands in the said articles, which came to the said *Edward* by descent from his father, that the said *Edward* should convey them to the use of himself, and the heirs males of his body, with the like remainders over to the defendants, *John*, *Arthur*, and *Tudor Trevor* successively, remainder to the right heirs of *Sir John Trevor* for ever; and for that purpose that the parties should levy and suffer such fines and recoveries as the case should require, but at the charges of *Edward Trevor*.

Which decree the respondent by his counsel insisted to be just for the reasons following.

First,

In the House of Lords.

First, for that by the scope of the articles, they were never designed to be a *settlement*, being only a bare agreement how, and to what uses and purposes the lands therein comprised should be settled; for by the first part thereof *Sir John* did covenant within two years to settle and assure the said lands to the trustees and their heirs, as they and their counsel should direct to the several uses in the said articles mentioned, and also in the said *settlement*, as should be agreed on, &c. (*viz.*) To *Sir John* and his assigns for life, without impeachment of waste; and after his death, then to the said *Jane* for life; and after her decease, to the heirs males of the body of *Sir John*, on the body of the said *Jane* to be begotten, &c.

* Nor can the *covenant to stand seised*, in the latter part of the articles, be taken as a *final settlement* from the very words and precedent part thereof; for it is only provisional, and to stand in force till a settlement should be made in form, and such a *settlement* which would answer the intention and agreement of the parties. * P. 165.

Neither can it be presumed, that *Sir John* should have a greater estate than for life; nor that it should be in his power to defeat his heir male of that provision and estate which by the articles were intended to be made for him, because the articles were founded upon the consideration of his marriage, and of the affection he did bear to his intended wife, and to the heirs males of their bodies to be begotten; so that the consideration extends as well to the issue male of that marriage, as to the wife; besides, the estate is expressly limited to *Sir John* for life, without impeachment of waste, which would have been in vain, if he had been *tenant in tail*, because in such case he would have been dispunishable of waste.

Moreover, the lands are directed to be limited after his death, and after the death of his intended wife, to the use of the heirs males of their bodies to be begotten, and to the heirs males of the body of such heirs males issuing; so that the first words are only a description of the persons who are to take, (*viz.*) The first and other sons, &c. and the subsequent words shew what estate they were to take, (*viz.*) To the heirs males of their bodies.

Now these articles could not be effectually performed without limiting the estate over to trustees to preserve contingent remainders, and in such manner, that it might come to the first and other sons of that marriage, and could never be intended to give a power to *Sir John*, to defeat his Lady of her estate for life, or the first and other sons of that marriage, from taking it after the death of the survivor; nor can it be presumed, that the trustees would have agreed to such a settlement.

As to the point insisted on by the defendants, that the respondent *Edward* hath received a full recompence and satisfaction for that estate which he was to have by the articles, by his father's suffering his *Irish* estate to descend to him, this is altogether immaterial; because *Edward* the eldest son doth not come for satisfaction or recom-

In the House of Lords.

pence by way of damages, which is quite out of the case; but he
* P. 166. claims a right as a purchaser to the specific lands and * tenements
comprised in the marriage-articles, and desires that the same may
be settled pursuant thereunto; and that against the defendants, who
now claim under a voluntary conveyance made to defeat those ar-
ticles; which conveyance was not made in favour of younger chil-
dren who had no other provision, for they were otherwise plentifully
provided for, the said *John Trevor*, the second son, having an estate
of six hundred pounds *per ann.* by the settlement in *October* 1699.
and there being an ample provision for the rest, by the respective
shares of the personal estate of their father.

After a long debate, the decree was affirmed.

* *Cases*

** Cases upon Appeals.*

* P. 167.

Edward Roper Esq; Appellant.

A N D

*Thomas Radcliffe and William Constable,
Two of the Executors of John Roper
Esq; deceased, Respondents.*

The Respondent's Case.

J. JOHN Roper being seised in fee of several manors, lands and tenements in the counties of *Cornwal, Gloucester* and *Monmouth*, did by lease and release, dated the 17th and 18th days of *January*, anno 1708. grant and convey the same to the respondents, *William Constable, Richard Snow, Daniel Hickman*, and their heirs, in trust to sell the same, and out of the money to be raised by such sale, and out of the rents and profits till sold, to pay a debt of 4000*l.* to *Hester* and *Elizabeth Walden*, due to them by a mortgage of the premises, with interest; and after the said principal sum and interest were paid, then in trust to them for the payment of several debts mentioned in a *schedule* to the said deed of release annexed; and the surplus of the said money to be paid to such person or persons as the said *John Roper*, by writing under his hand attested, &c. or by will should appoint; and in default of such appointment, then in trust for the said *John Roper* and his heirs.

Devise of Lands to a papist, is a purchase within the meaning of the act 11 & 12 Will. 3. to prevent the growth of popery. 2 Wil. Rep. 5. Stra. 267.

Afterwards the said *John Roper* made his will dated the 5th of *March*, 1708, reciting the said *lease and release*, and the power reserved to him therein to dispose the surplus of the said money, and devised several money legacies to several of his relations mentioned in the said will, and the residue of all his real and personal estate he devised to the respondents, * *Thomas Radcliffe and William Constable, Robert Hewitt and Daniel Hickman*, their heirs and assigns for ever, and made them joint executors.

* P. 168.

In the year next following, (*viz.*) The 1st of *April*, 1709, the said *John Roper* added a *codicil* to his will, and thereby devised several legacies to persons therein mentioned, and all the remainder, whether

Cases upon Appeals.

whether in lands or in personal estate, he devised to his said executors, *Radcliffe* and *Constable*, the now respondents.

And in the same month, (*viz.*) The 10th of *April*, 1709, the said *John Roper* added another *codicil* to his will, and thereby devised to the said *Thomas Radcliffe* all his household goods, and power to renew the lease of his dwelling-house if he thought fit; and he devised all his books to the said *William Constable*, and soon after he died.

Then *Thomas Radcliffe* and *William Constable* exhibited their bill in Chancery against *Edward Roper*, and against *Snow* and *Hickman*, and others, to have the trust-estate sold, and to have an account of the profits, and (after the debts and legacies were paid) to have the surplus-money arising by such sale, equally to be divided between them, to whom it was devised by the *first codicil*.

To which bill *Edward Roper* the defendant (the now appellant) put in his answer, insisting, that he was *heir at law* to the said testator *John Roper*, and entitled to all such real and personal estate, not sufficiently devised or conveyed by him; and that the respondents *Radcliffe* and *Constable* are, and at the time of the testator's death were *papists*, and persons professing the popish religion, and as such were rendered incapable by the statute 11 & 12 Will. 3. of purchasing any lands or profits out of lands; and that the appellant is heir at law, and a *protestant*, and therefore claimed the benefit of that act, being capable by law so to do, and demanded the judgment of the court, whether he should be decreed to join in the said sale.

And the other defendants *Hewitt* and *Hickman*, by their answer, insisted, that the *real estate* devised by the will ought to be considered as the remaining part of the testator's lands, after so much thereof was sold as would be sufficient to discharge all his debts and legacies; and if the other respondents *Radcliffe* and *Constable* were incapable to take them, being disabled by the statute, because they were *papists*; then the said defendants *Hewitt* and *Hickman*, being the two *protestant executors*, claimed the same, as being the * only devisees capable to take by virtue of the will; and they insisted, that the *first codicil*, as it related to a devise of the testator's lands did not control the devise of the residue of the testator's lands to *Radcliffe* and *Constable*, mentioned in the will, because if they were incapable by the statute to take the lands by the will as purchasers, they are to be esteemed as persons not in being, and that in such case that *codicil* was void in law.

But admitting they were capable of taking the remainder by the *first codicil*, yet that gave them no greater an estate than for life; and if so, then the reversion in fee must come to the defendants *Hewitt* and *Hickman*; and for that purpose they brought their cross bill, insisting upon this matter as they had done by their said answer to the original bill; and the several defendants, and the mortgagees and the creditors having put in their several answers, and the legatees having

Cases upon Appeals.

having exhibited their bill to be paid their legacies, all the said causes came to a hearing the 27th of June 1712, before the Lord Keeper *Harcourt*, who took time to have the opinion of the judges before he would make any final decree; and a case was stated and argued before the Lord Chief Justice *Parker*, the Lord Chief Justice *Trevor*, and Judge *Powell*; and they likewise taking time to deliver their opinions, they, together with Sir *John Trevor*, Master of the Rolls, concurred in opinion, that the devise of the residue of his real and personal estate, devised to the said *Radcliffe* and *Constable*, after debts and legacies paid, was a good devise notwithstanding that statute by which papists are disabled from purchasing lands, tenements or hereditaments, for the surplus-money is a personal interest in them, and therefore the devise thereof is not void, either by the words or intention of that act.

And an account was decreed of the testator's real and personal estate, and that the real estate should be sold to the best purchaser, to be approved by the Master, wherein the appellant, who was heir at law, should join, he being first paid his costs; and a receiver of the estate was appointed, giving security as usual; and the money arising by sale, together with the profits of the lands till sold, should, in the first place, be applied to satisfy the mortgage of 4000 *l.* with interest and costs, and then the schedule debts with interest; and then all the other debts standing out and not discharged by the personal estate, and then the * legacies should be paid, with interest * P. 170. and costs, and the creditors were to come in to prove their debts.

And as to *Hewitt* and *Hickman*, the court was of opinion, that the first codicil, by which the testator devised all the remainder, whether in lands or personal estate, to the said *Radcliffe* and *Constable*, this was a revocation of the devise in his will of the residue of all his real and personal estate to *Hewitt* and *Hickman*, and so their bill was dismissed with costs.

From this decree an appeal was brought in the house of Lords, and the principal points insisted on to maintain it were,

That this devise was no purchase within the statute, because the word purchase in that act must be intended where a man is active in it, and not where lands are given to him by a will.

That as *Radcliffe* and *Constable* could take no lands by this will, because those were conveyed to trustees, to be sold for the payment of debts and legacies, and the residue was devised to them, that residue is no more than a pecuniary legacy, which they were capable to take notwithstanding the statute.

That it is a standing rule in equity, that lands devised for payment of debts and legacies are to be deemed as money; and that money devised to buy lands is deemed as land; and so it is also of lands or money in the hands of trustees; therefore, as the respondents were under no manner of conviction as papists, they were justly entitled to this residue.

Cases upon Appeals.

For the ap-
pellant.

But it was answered, and so resolved, that this statute intended to abridge the power and interest of papists; and if a *devise* should be construed to be no *purchase* within that act, then papists were in a capacity to take great part of the lands in *England*; therefore a devise to a papist must be a *purchase*, (*i. e.*) To such a papist who was a stranger to the inheritance, but not where a particular estate or interest comes to the heir at law by a devise, for that is but a modification of that estate which would otherwise descend to him, so as he is under eighteen years of age, and conforms within six months after he should arrive at that age.

* P. 171.

That tho' lands devised for payment of debts and legacies are to be deemed as money so far as there are debts, and * specific legacies to be paid; yet still the heir at law hath an interest in such lands by a *resulting trust*, so far as they are of value after the debts and legacies are paid; and the heir at law may properly come into a court of equity, and restrain the vendor from selling more of the lands than what are necessary to raise money sufficient to discharge the debts and legacies, and to enforce the devisee to convey the residue to him, which *residue* shall not be deemed as money, neither shall it go to the executors of the testator.

Nay, the heir at law in such case may properly come into a court of equity, and offer to pay all the debts and legacies, and pray a conveyance of the whole estate to him: for the devisee is only a trustee for the testator to pay his debts and legacies.

This is a privilege which hath been always allowed in equity to a *residuary legatee*; for if he comes into court, and tenders what will be sufficient to discharge all the debts and legacies, or prays that so much of the lands, and no more, may be sold, than what will raise money to discharge them; this is always decreed in his favour.

Lands given
in trust, or
devised to pay
debts and le-
gacies, shall
be deemed as
money in re-
spect to credi-
tors, but not
in respect to
the heir at
law, or re-
siduary lega-
tee.

Therefore tho' lands given in trust, or devised for payment of debts and legacies, shall be deemed in equity as money in respect of the creditors and legatees; yet it is not so in respect to the heir at law, or residuary legatee; for in those cases they shall be deemed in equity as *lands*; and if so, then the residue in the principal case being devised to *papists*, it shall be deemed as *lands*; and consequently it is a *purchase* within the statute before-mentioned; for which reasons the decree was reversed in the house of Lords, 11 July 1713.

See the case next following.

* Cases

Die Lunæ 16 die Februarii Anno regni Domini nostri Georgii Regis Magnæ Britanniae 5. Before Mr. Justice Powis, Mr. Justice Tracy, Mr. Baron Mountague, Justice Fortescue, and Baron Page, Delegates appointed to determine Appeals from the decrees of the Commissioners of the *Forfeited Estates*.

The Appeal of the Lord Derwentwater.

The CASE.

THE late *Lord Derwentwater*, the appellant's father, being a *roman catholick*, and tenant in tail male of the lands in question, with several remainders over, did, upon his marriage with the daughter of *Sir John Webb*, suffer a *common recovery*, &c. and declared the uses thereof to himself and his heirs; and afterwards by *lease and release* he settled the said lands to the use of himself for life, then on trustees to preserve contingent remainders, then to his first and other son and sons of that marriage in tail male, with several remainders over.

A papist being tenant in tail, suffered a common recovery, and declared the uses to himself and his heirs; this is not a (a) purchase within the statute 11 & 12 Will. 3.

for it is no new acquisition, but a modification of the family estate. Stra. 267. (a) The like determination, as to the meaning of the word purchase in stat. 9 Geo. c. 7. s. 5. concerning purchasing an estate or interest in a parish; the consideration whereof is under 30 l. 3 Burn's Just. 362. 8vo. Edit. 1766.

Afterwards the said *Lord Derwentwater* was attainted of treason and executed; the appellant his son, being then an infant, put in his claim before the commissioners, and by the opinion of four against three, the claim was dismissed; from which decree of dismissal he now appeals.

* The

* P. 173. * The single question was, whether a *papist*, by suffering a common recovery, and having a marriage settlement, shall be a purchaser within the statute 11 & 12 Will. 3. for if he is, then this recovery and settlement are void.

And this depends upon the construction of that statute, by which it is enacted, That after the 29th of September 1700, persons educated in, or professing the popish religion, who shall not, within six months after they attain the age of eighteen years, take the oaths of allegiance and supremacy, and make and subscribe the declaration, &c. shall be disabled, but not their heirs or posterity, to inherit or take any lands, &c. in this kingdom, &c.

And that after the 10th of April 1700. no *papist* shall purchase mediately or immediately any lands, tenements, or hereditaments within this kingdom, or profits out of the same, but all such estates or profits out of lands shall be void.

For the appellant.

The counsel for the appellant argued, that it was never yet questioned, whether a tenant in tail being a *papist*, could suffer a common recovery; for if he could not, then he would be barred of disposing his estate, and from providing to pay his debts, and to make provision for younger children.

That the intent of this statute was to hinder *papists* from making new acquisitions, and to prevent the growth of their landed interest, but not to take from them the power of disposing their estates; it was to make new purchases void, but not the alterations or modifications of their own estates.

The word recovery is not mentioned in this statute, and there is no word under which it may be comprehended, unless it is the word purchase; but it would be a strained construction to make the appellant's father a purchaser within this statute by suffering this recovery; and declaring the uses thereof, because a purchaser always comes to the estate by the act of the party; but here the tenant in tail came to his estate by act of law; and therefore a *papist* will be tenant by the curtesy, and tenant in dower, notwithstanding this statute, because in both these cases, the estate is got by act of law, and not as a purchaser by the act of the party.

Besides, a purchaser must buy the estate of some body, which in this case cannot be either of the reversioner, or those in remainder, because they are strangers to the recovery, and never executed any conveyance.

* P. 174. * Neither can this tenant in tail be a purchaser in respect to the tenant of the *præcipe*, or to the recoveror, because they are only made parties by the direction of the law, and thro' necessity, and have nothing in reality, but a seisin in fee for an instant.

So that if this recovery should be construed as a purchase, there will be a grantee or donee without a grantor or donor, and the tenant in tail must be a purchaser of himself.

When

Before the Delegates, Term. S. Hill. 5 Georgii.

When tenant in tail suffers a recovery, he makes use of that privilege which he hath by law of having a power over those in remainder or reversion, which power he executes by suffering the recovery; for it cannot otherwise be done; but it is inconsistent to say, that by this means he *purchaseth the remainder or reversion* when it is only a bar to them to claim the estate; therefore if it is a bar, it cannot be called a *purchase*.

Besides, in suffering a recovery, no body is considered but the tenant in tail; for if he declares the uses thereof, and if the recoveror should declare other uses, those declared by the tenant in tail are good, and the other void; so if tenant in tail is disseised, and the disseisor and disseisee join in a fine, and they and the cognisee declare separate uses, those which were declared by the disseisee, and those alone, are good; from which it may be inferred, that the tenant in tail is the only party interested in the recovery or fine; and that the recoveror or cognisee are only made parties thro' necessity, to keep up the forms of recoveries, which are of so great value in the law, that the *Chief Justice Dyer* tells us that he was not worthy to wear a gown, who should speak against them.

My *Lord Coke*, in his *1 Institute*, calls a recovery a common conveyance, and it is a privilege so inseparably incident and annexed to an *estate-tail*, that the tenant in tail cannot by any means be deprived of it; therefore if a gift in tail is made on condition, that the donee shall not suffer a recovery, this condition is repugnant and void, because the law gives him a power so to do.

1 Inst. fo.
10. a.

In the principal case, if the appellant's father had declared the uses to himself and his heirs, this would not have been a new use but the old one; so that if he had been seised *a parte materna*, and after the recovery had declared the uses to himself and his heirs, in such case the heirs *+ parte materna* should inherit, and those *a parte paterna* would not; and if he had declared no uses, then by operation of * law, the use would result to the heirs *a parte materna*, * P. 175. and they would have immediately been seised in fee.

1 Inst. 224. a.
6 Rep. 41. b.

+ Salk. 590.
3 Lev. 406.

It hath been pretended, that every alteration of the estate shall be taken to be a *purchase* within this statute, but it is quite otherwise; for if a papist is seised of a defeasible estate, and levies a fine thereof with proclamations, and five years pass without any claim; now by this means the estate is become indefeasible; this is certainly an alteration of the estate, but no body will say it is a *purchase*.

So where the father being a papist, settles his lands upon his son, with a *power of revocation*, and after he executes that power, so that the estate is revested in the father, this is likewise an alteration of the estate; but it was never yet called a *purchase*.

Before the statute * *de donis, &c.* where lands were given to a man, and to the heirs of his body, &c. upon condition, that if he

* Westm. 2:
cap. 1. Anno
13 Ed. 1.

die without issue, the same should revert to the donor; yet *after issue* born he had power to alien, and to bar such issue, and all possibility of reverting to the donor, which he could not do *before he had issue*; so that the getting a child made a great alteration in his estate; but no man can say that he became a *purchaser* by getting a child.

It was not insisted on by the counsel on the other side, that the *Lord Derwentwater* could not make any settlement; for certainly if he had been tenant in fee-simple, this settlement had been good; but his gaining a *fee-simple by suffering a recovery* as tenant in tail, and declaring the uses thereof, makes no alteration as to that matter, because a common recovery is a conveyance which a tenant in tail is entitled to make by law, and thereby to do as much as any tenant in fee can do; and the power of suffering such a recovery is inseparably incident to every tenant in tail, and so closely united to the estate, that as a tenant in fee cannot be restrained by any condition to alien, so neither can tenant in tail from suffering a common recovery.

But the reason of the commissioners decree is, for that the *Lord Derwentwater*, by suffering this recovery, &c. did acquire a new and greater estate than he had before; so that by this means he became a *purchaser* of such estate.

* P. 176. It is true, his estate is new modelled, but not new made; and take it altogether, he hath a less estate after suffering the recovery than he had before; for if the recovery, and the declaration of the uses and the settlement he looked upon * as one conveyance, (for so it is in law), then instead of an estate-tail, he hath only an estate for life; and there is an express authority, that the recovery and the deed to lead the uses and the settlement, are but one conveyance; for so it was resolved in the Lord * *Cromwell's* case, where the bargain, the recovery and the fine, tho' made at several times, yet all being made by the mutual agreement of the parties, were but one assurance, and tended to perfect the bargain.

* 2 Rep. 70.

Where tenant in tail levies a fine, or suffers a recovery, and declares no uses, in such case the use is to him and his heirs, for it can never result to him in tail, because that estate is extinguished by the fine, and barred by the recovery; and therefore this Lord having by an express deed declared what is implied by law, this express declaration and deed must be brought under that maxim, (*viz.*) *expressio eorum quæ tacite insunt nihil operatur.*

It hath been said, that if the *Lord Derwentwater* had been tenant in fee, this settlement had been good; now, if that be admitted, then tenant in tail in some sense hath as large an estate; for as tenant in fee may by *feoffment, bargain and sale enrolled, lease and release, &c.* dispose the fee; so may tenant in tail, by using the proper means he hath by the law, which is by *suffering a recovery*;
so

so that tho' he is not tenant in fee *in actu*, he is so *in potentia*; and it plainly appears in the books, that he hath the whole power over the estate in his hands; for the remainder-man cannot charge it but at the will of the tenant in tail; for if he suffers a common recovery, all such charges are barred as well as all the remainders, and shall never take place, tho' the tenant in tail should die without issue; and that is the true reason why a remainder after an estate-tail is of no consideration in the eye of the law, for it shall not be deemed assets in the hands of the heir; and if an action should be brought against him, in such case, *riens per descent* is a good plea for him. For these reasons it was prayed, that the decree of the commissioners might be reversed.

The counsel on the other side, who argued against the *appellant*, admitted several things which were alledged on his behalf, as that tenant in tail hath power of suffering a recovery, and by that means to bar the issue in tail, and likewise all remainders and reversions; and that such power is inseparably annexed to his estate, and cannot be restrained * by any condition; and that where he suffers a recovery and declares no uses, there the use results to him and his heirs; but notwithstanding all this matter, the *Lord Derwentwater* was a *purchaser* both within the meaning and letter of this statute. Econtra against the appellant. P. 177.

It cannot be denied but that the word *purchase* is mentioned in this act, (*viz.*) *No papist shall purchase any lands, &c.* then it must be considered, whether this case doth come within the legal signification of that word; and as to that matter, my Lord * Coke tells us, that every man who hath an estate, hath it either by right or by wrong; if by right, then it must either be by *purchase* or by *descent*, so that there are but two ways to have a rightful estate, of which *purchase* is one; therefore this Lord, after he had suffered the recovery and declared the uses, &c. not coming in by descent, it must necessarily follow, that he came in by *purchase*. * Co. Lib. 2.

In the same † book it is said, that he is a *purchaser* who comes to lands either by *conveyance* or *title*; now this Lord came to the lands in question by *conveyance*, therefore he is a *purchaser*. † Co. Lit. 3.

The word *purchase* hath been taken in this sense in other acts of parliament, and particularly in the ‡ statute of *mortmain*, by which it is enacted, that lands *purchased* by people of religion shall be forfeited, and that hereafter no *purchase* shall be made to the use of spiritual persons; yet if a conveyance of lands is made to them by way of gift, or by will, they were accounted purchasers of such lands. ‡ 15 Ric. 2. cap. 5.

Words in acts of parliament are always to be understood in that sense the law puts on them; now the design of this law was to put such hardships on papists, that they might be obliged to part with their landed interest, and transfer the same to *protestants*.

A mortgage made to a papist is void, so that the incapacity of taking lands in any case is meant by this statute; therefore this Lord could not alter *his estate-tail*, and turn it into fee-simple.

The words in this act are very express, (*viz.*) *That no papist shall purchase*; it doth not say for a valuable consideration, but generally without any manner of restriction; but in several statutes a distinction is made between a *purchaser* generally and a *purchaser for a valuable consideration*; and if the parliament had intended the latter, it is probable it would have been expressed in this statute.

* P. 178. * Now in construction of acts of parliament, it hath been an old rule, that every mischief not expressly provided against is intended to be remedied by the act; and in the case of † *Roper and Ratcliffe*, where the decree in Chancery was reversed in the house of Peers, it was held that a *devise was a purchase* within the meaning of this statute; and if a devise is a purchase, certainly a recovery and a declaration of the uses to himself and his heirs must be a purchase, especially when by the statute he is capable of taking any use; and he cannot take any resulting use by implication of law, for that would be contrary to the maxim, *expressio facit cessare tacitum*, and he had plainly expressed the uses by the deed.

† Antea hic.

Now if this Lord should take by virtue of this recovery and declaration of uses either expressed or implied, he would have quite another estate than what he had before; and the females would inherit, which they could not before, for after making this settlement, if this Lord had issue a son, who had issue a daughter, she would now inherit, which she could not do before, because he was tenant in tail male.

As to the objection which hath been made, that if this recovery should be adjudged void by virtue of this statute, it would incapacitate papists from selling their estates to *protestants*; the answer is, that there is no clause in the statute which puts them under such an incapacity, the parliament intending it for the benefit of *protestants*; and therefore it ought to be taken in the largest sense, and to extend to every conveyance by which a papist shall take lands, as well as to a purchase for a valuable consideration.

Obj. It hath likewise been objected, that the power of suffering a common recovery being a privilege inherent to an estate-tail, it could never be the intent of the parliament to restrain that privilege, especially since the word *recovery* is not mentioned in the statute.

Answ. It is very true, the word itself is not mentioned; but as a recovery is a purchase, it may properly be said to be within the words of the statute, and consequently within the intent thereof; and to prove that a recovery is a purchase, it was insisted, that as soon as it is suffered, there is an estate in fee in the recoveror, and all the uses arise out of his estate, and a purchaser, even for a valuable

ble consideration must claim the estate of the recoveror, and not of the *tenant in tail who suffered the recovery*.

* Now the *intent* of this act was to hinder papists from taking * P. 179. greater and better estates than they had before, (*viz.*) From taking a fee-simple, where before they had only an estate-tail, and to restrain them from making settlements to perpetuate their estates in their families.

Where a papist is tenant in tail, remainder over to another, and he in remainder conveys his estate to the tenant in tail, this would be a purchase, and void within this act.

Now in the principal case, the *Lord Derwentwater* got the remainder by suffering this recovery; but the case is the same, whether he got it by conveyance or recovery; for both are void by this statute, which if it should be otherwise construed, in would be in the power of a papist tenant in tail to bar the remainder in fee in a protestant; and tho' it may be said, that it shall bar the issue in tail, and the remainders, so that they shall never take any advantage against it; yet the crown being a stranger to the recovery may set it aside, because in respect of the crown, the estate-tail is in *esse*; so is the case of * *Crocker versus Kelsea*, where tenant in tail levied a fine, and declared the uses to himself and his heirs, it was resolved, that the estate-tail was barred as to him who levied the fine, and as to his issue; but that in *rei veritate*, it was not determined, for all strangers might say, that it was in being.

* Cro. Jac.
688.
Hutt. 84.

It is true, when *tenant in tail suffers a recovery*, every one who comes in by such recovery, comes in † continuance of the estate-tail, and must be liable to all the charges made by the tenant in tail, and the charges of those in remainder are barred; but this doth not prove, that an estate-tail is as large as an estate *in fee*, which is the point now in question; therefore if this Lord hath gained a new and greater estate than he had before, it is plain such estate is void within the intent and words of this statute.

† Benson ver.
Hodson.
T. Raym.
236.
1 Mod. 108.
2 Lev. 28.

The question is not, whether a recovery suffered by tenant in tail shall bar the remainders and contingencies expectant upon such estate; but whether he who suffered the recovery shall (after the making this statute) take any advantage of it after it is suffered.

As to the case put on the other side, (*viz.*) That where *tenant in tail a parte materna* suffers a recovery, and declares no uses, in such case the use shall be to the heirs *a parte materna*; this is not law; it is true, it is so where a man is tenant in fee-simple, but not where he is tenant in tail.

* Upon the whole matter it was insisted, that the Lord *Derwent-* * P. 180; *water* was a purchaser within the words and intent of the statute; therefore it was prayed, that the appeal might be dismissed.

Curia.

But the decree of the commissioners was reversed by the *delegates*, by the opinion of four against *Justice Fortescue*.

It is plain, that a papist under the age of eighteen years, at the time of making this statute, may take either by descent or *purchase*, and that the word *purchase* in this statute is only a *modification of the estate*, and shall not be taken in the full extent of the word; for those *purchases are only intended by the statute, by which papists enlarge and extend their landed interest*, and not where by deeds of settlement the antient family estate is new modelled, without making any *new acquisition*; so that even at this day a purchase by limitation in a settlement, or by a devise to a papist under the age of eighteen years, is good, so as such papist, within six months after he comes to that age, conform and take the oaths, &c. otherwise he loses the *pernancy* of the profits during his life only.

* The

* The Arguments of the then Chief Justice of B. R. in the Case of *Roper* and *Radcliffe*, &c. *ante* page 167. * P. 181.

THE first and great question in this case is, whether the interest devised by Mr. *Roper* be such an interest, or of that sort as is within the words (or intent) of this act. Stra. 267. Stat. 11 & 12 W. 3. c. 4.

And herein it will be proper to consider,

1. The words of the act.
2. The nature of the interest.

1st, There are two expressions (or clauses) in the act that concern this point.

1. By the first, *every papist, or person professing the popish religion, is disabled and made incapable to purchase any manors, lands, tenements, rents or hereditaments in his own name, or in the name of others, to his use, or in trust for him.*
2. By the second, *all estates, terms, and any other interests or profits whatsoever, out of lands, tenements, or hereditaments, made after the 10th of April, 1700. to, or in trust for the benefit of a papist, &c. are made void.*

So that all *lands, tenements, rents, and hereditaments*, are within the 1st; and,

All *estates and terms*, inheritable, or not; and,

All other *interests or profits whatsoever, out of lands, (&c.)* are expressively within the 2d.

There are no qualifying words to make it material, whether the *term or interest* be long or short, or what other circumstances it be attended with, provided it be, *out of land, &c.*

And the word *whatsoever*, seems to be added, on purpose to shut out all pretence of distinction between one *estate, term, interest, or profit out of land*, and another.

Now, as to the interest devised to Mr. *Constable* and Mr. *Radcliffe*, it is a *trust* and an *interest*, and as such it is demanded by their bill.

* And of what *nature* it is, will appear by the deed, the will, * P. 182. and the codicil, whereby it is created and disposed:

The Case of *Roper* and *Radcliffe*, &c.

The Creation of it was thus,

Ante 167.

MR. *Roper* by lease and release conveys several lands and manors in the counties of *Cornwal*, *Gloucester*, and *Monmouth*, particularly named; and all other his lands, tenements, and hereditaments in those counties, to *William Constable*, Esq; *R. Hewit* and *Daniel Hickman*, and their heirs, upon trust, as soon as conveniently may be, to make sale of the premises in parcels, or in the whole, to the best purchaser or purchasers, and for the best price or prices that can be reasonably had or gotten for the same; and by and out of the rents and profits arising (thereout) till such sale; in the first place, to pay 4000 *l.* owing to Sir *Robert Cotton* and *John Proby*, secured upon the lands in *Cornwal*, with the interest thereof; and then to pay the debts in the schedule, being three debts, amounting to 390 *l.* And then

To pay and dispose the residue to and for the benefit of such person and persons, and to and for such ends and purposes, and in such manner as the said *J. Roper*, by any writing or writings under his hand and seal, testified by three, or more, credible witnesses, or by his last will and testament in writing so testified, shall direct, limit and appoint; and in default of such appointment, or until such direction, limitation or appointment shall be made, to pay and dispose of such residue or overplus, to and for the benefit of the said *J. Roper* and his heirs.

And the trustees are declared chargeable only for so much as they respectively shall actually receive.

The trust being thus created, *J. Roper* makes his will, and reciting the said deed in pursuance of the said indenture, or by any other power vested in him, he gives, devises and bequeaths out of the surplus of the money arising, or to arise by and out of the sale or sales of those manors, lands and premises, and by and out of the rents and profits of the premises arising till such sale, the several sums following; and so disposes of several sums, in all about 1600 *l.* and then goes on. " And as to all the rest and residue of
" my estate both real and personal, of what nature or kind soever, I give, devise and bequeath the same to the said *William*
* P. 183. " *Constable*, and unto the honourable * *T. Radcliffe*, Esq; *Robert Hewit*, Gent. and the said *Daniel Hickman* equally, and
" unto their heirs and assigns for ever. And makes them ex-
" ecutors.

And afterwards adds a codicil, and disposes of 140 *l.* in legacies (tho' out of the lands) and then goes on thus, " All my remainder,
" whether in lands or in personal estate, I leave to my worthy and
" beloved executors *T. Radcliffe* and *William Constable*.

The Case of *Roper* and *Radcliffe*, &c.

The particular times of executing these several instruments appear not; but their dates are near together, *viz.*

The lease and release 17 & 18 *January* 1708.

The will 5 *March* 1708.

The codicil 2 *April* 1709.

So that the trust now contended for, is that trust which Mr. *Roper* reserved to himself and his heirs, in the surplus of the money to be raised by the sale of his lands, rents, and profits, and till sale, after the payment of the several debts and legacies appointed.

And it is devised by the will, to his four executors, and their heirs, under the title of *the rest and residue of his estate real and personal*. And by the codicil, to two of those executors, under these words, *all my remainder, whether in lands or personal estate*.

And there appears no other estate to answer the words *real estate* in the will, or other lands (or personal estate) to answer those in the codicil, but this trust.

The lands are not turned into money in his life-time, but remain yet unfold in the hands of the trustees, subject to, and charged with this trust.

And the question now is,

Whether this trust, this right to the surplus, to be received out of those unfold lands, be within this act of parliament? *i. e.* Whether it be an hereditament or an estate, or any interest or profit whatsoever out of lands?

(For if it be any of these, it seems clearly within the act.)

This may be considered in two different views:

1. As it agrees with those other sums appointed to be raised by this trust, in this respect, that it is a right to something to be raised out of lands.

2. As it is distinguishable from those other sums, in respect of its being a surplus, after the other charges are paid off.

* First, had this not been a surplus, but a certain sum appointed to be paid out of those lands, it must be admitted to have been ⁽¹⁾ within the act; for that says, any interest or profit out of lands for the benefit of persons professing the popish religion. * P. 184.

Now, that it is for the benefit of persons professing the popish religion, is agreed.

And, that it is an interest in (or out of) lands, seems most clear: For,

1. The trustees hold the legal estate in the lands, not at all for their own advantage, but (in the words of the act and of the trust) for the benefit of others.

2. Suppose the executors and legatees, and those who are entitled to the surplus, release to the trustees all their right in the land, it will extinguish this right. And in such case the trustees,

The Case of *Roper* and *Radcliffe*, &c.

who had before only a nominal estate, will then have the beneficial estate too; *i. e.* The whole fee both legal and equitable.

3. If they grant all their right, title and interest in those lands, this (interest) will pass.
4. If they should grant the land itself, it can be no question but this will pass.

Also we may consider the nature of this interest further, as it is a right to a sum to be raised out of land.

1. The estate and concern of the trustees therein, *viz.*

They have an estate in fee, in trust, to apply the profits, or permit them to be applied for the benefit of the persons to whom the several sums to be raised are appointed to be paid.

1. If there were not an express appointment for them to sell, but that the monies were to be raised out of the profits; they could not sell without consent of him that has the surplus, but must be contented to take the profits as they arise.
2. Tho' there be an express trust and power to sell, yet it only authorizes them to sell. If, and when they can. And on the best prices, &c. And in the mean time all the profits are in their hands by anticipation; and the trust (or right) is to be managed in the same manner as if to be raised out of the rents and profits only.

- * P. 185. * 3. Consider the interest and power of the trustees, *viz.*

They amongst them have the whole trust of the lands, which is a power over the estate therein. And those who are entitled to have particular sums raised, have particular trusts carved out of the inheritance in nature of chattel interests. For,

He that has 500*l.* appointed to be raised out of an estate of 100*l.* *per annum*, has an interest (in the land) of like nature, and much of the same continuance, as if he had a trust (therein) for five years,

If the trustees make not the most of the lands, or suffer not him to do it, they break their trust. A trust to sell being, as I observed before, but in nature of a power to sell. And,

1. *Till sale*, his right to the profits is the same as if no such power.
2. *By sale*, his interest in the land is gone, and he now has a trust in the money, and is paid so much the sooner.

(2) Secondly, this trust now in question may be considered as it is distinguishable from the particular sums to be paid out of those profits, in respect of its being a right to a surplus after debts and legacies paid.

And in that respect I think it yet more clearly within the act.

1. Upon

The Case of *Roper* and *Radcliffe*, &c.

1. *Upon the construction of the deed.* For thereby it was so vested in *J. Roper*, as to be not only an interest and profit out of lands, but such a one as was an hereditament, and descendable to his heirs, it being expressly reserved to *J. Roper and his heirs*. And it is agreed on all hands, that *Ed. Roper*, the heir, would be entitled to it, if the will and codicil were out of the way. And,

If it were merely personal, a limitation to him and his heirs would vest it wholly in him, and it would go to his executors.

2. *The constant opinion in Chancery.* All the cases there, both for and against heirs, who have sued for such surplus, are authorities, that the trust of such a surplus is a real estate, and descendable to the heir of him who created it.

But before I state the cases, I would mention that, which is the ground both of these cases of trusts, and also of the cases of uses executed by the statute.

* 1. And, first of uses.

* P. 186.

A use, before the statute of uses, was a meer trust cognizable only in equity, and is since expounded in the common law courts by the rules of equity; and as to that, I would use the words of Lord Ch. Just. *Cook*, 1 *Inst.* 23. a. whosoever is seised of lands, has not only the estate of the land in him, but a right to take the profits, which is in nature of a use.

So that if the lands descended of the part of the mother, the use shall go to the heir of the part of the mother, which could not be if it were not the old use (or estate) but only a thing newly created. And the like law is of the custom of Borough *English*, Gavelkind, &c. ^{See Salk. 679.}

This is called a resulting use.

And the law is the same, if after particular uses there were an express limitation to the feoffor and his heirs. 1 *Inst.* 22. b.

Indeed some books do mention this last as a new use: but it has been divers times resolved and settled to be the old use, as in *Godbolt* and *Freeiston's* case, and *Abbot* and *Barton's* case, in C. B. *Trin.* 7 *Ann.*

2. Secondly, as to trusts.

A man in consideration of equity has an estate in land as a trust; this is as a use in consideration of law, and follows the person of *cestui que trust*, being a beneficial interest and profit. And so much of the trust as in a conveyance is undisposed of, the executor (Q.) has in him as his antient trust.

This is called a resulting trust.

And if the disposition be by will, the like resulting trust will descend to the heir as part of the antient trust not devised from him.

So a conveyance or devise to trustees to pay debts, passes the whole estate in law, and part only of the trust; that is, trusts for the particular

The Case of *Roper* and *Radcliffe*, &c.

particular sums in nature of chattel interests, after which the residue of the trust results to him or his heir as undisposed; and such residue is the fee of the antient trust descendible; as in *Culpeper* and *Austin's* case, *Mich.* 28 *Car.* 2. 2 *Chan. Cases* 223. And

* P. 187. *Trin.* 34 *Car.* 2. It was laid down as a rule, that when lands are appointed to be sold, or are conveyed in trust to pay * debts, the heir is entitled to have the lands after the debts paid, by an implied and resulting trust. And *Pasch.* 32 *Car.* 2. 2 *Ventr.* 349. If lands be devised for the payment of debts and legacies, and the residue of the personal estate be given to the executor (after debts and legacies paid), the personal estate shall notwithstanding, so far as it will go, be applied to the payment of the debts and legacies, and the land no further charged than is necessary to make up the residue.

And *Mich.* 33 *Car.* 2. 2 *Ventr.* 399, or 355. If a man makes a lease, or devises an estate for years (he being seised of an estate of inheritance) for payment of debts, if the profits of the land surmount the debts, all that remains shall go to the heir, tho' not so expressed; and albeit it be in the case of an executor.

Also the case of *Cook* and *Gwavas* in *Scaccario*, 25 *Jan.* 33 *Car.* 2. was thus: *J. Cook*, 28 *Julii* 1671. after several particular legacies, devised all his goods and chattels to *R. Cook*; Esq; *Eliz. Cobb* and *William Gwavas*, to their own disposition, and makes them executors: and by indenture of the same date demised several manors and lands in *Norfolk* to the said *Cook* and *Gwavas* for 500 years, upon trust for himself for life, and after his death upon trust out of the rents and profits to pay his debts, legacies, and funeral expences; and four years after to attend the inheritance.

The plaintiff, as grandson and heir to *J. Cook*, exhibited his bill to have an account of the personal estate, and of the rents and profits of the real estate, and that the personal estate might be applied to pay debts and legacies, in case of the real.

The defendants, the executors, insisted, that they were entitled to the personal estate, as a legacy, and the two trustees claimed the profits of the lands for four years after the debts and legacies paid, as an implied gift, the term being appointed to attend the inheritance after four years. But

Decreed, that the personal estate be applied in exoneration of the real estate; and that the four years be in trust for the complainant, and such other persons as shall have the freehold and inheritance; and to attend the said freehold and inheritance.

* P. 188. The case of *Sir John Packington & Ux.* in *Scaccario*, 22 *Junii* 1708. and 30 *Maii* 1709. *Sir Herbert Perrot*, by will dated 21 *Junii* 1682. made his wife (who afterwards married * *Sir Cyrill Wyche*) executrix, charging her to see his will performed, and thereby gives her a rent-charge of 205 *l.* with this special trust, that she may be supplied with money for the payment of all his debts and legacies; to which end, I do hereby give to my said executrix

The Case of *Roper* and *Radcliffe*, &c.

testatrix a lease for thirteen years, to begin within six months after my decease, of all the said rent-charge of 205 *l. per ann.*

And this was decreed to be a trust for the heir after debts and legacies paid; and this decree was affirmed in parliament 15 *May* 1712.

These cases were indeed upon terms for years, but the ground of them was this, that tho' all the term was parted with, yet only part of the trust thereof was disposed; and that not only the inheritance, but likewise all the trust undisposed (*i. e.* the whole trust of the inheritance, and the residue of the trust of the term) descended to, and was part of the old trust in the heir.

And the reason is the same where it is of an inheritance; if only part of the trust be disposed of for payment of debts or legacies, &c. The residue of the trust remains still undisposed.

There have been divers cases of that kind, *viz.*

North versus *Crompton*, 1 *Chan. Cases* 196. *Catharine Crompton* seised in fee of the lands in question, by her will dated 21 *Jan.* 1669. devised to *H. North*, Esq; her executor, all her estate real and personal, to dispose of for payment of all her debts and legacies; and *int. al.* gives 200 *l.* to the defendant, her uncle, and heir at law. And upon the hearing, two questions were made.

1. Whether this was a devise in fee; and, 2. Whether Mr. *North* (the defendant claiming by an implied trust after debts, &c. paid) might not aver against that implication? And after long debate it was decreed against the heir at law, *viz.*

1. That a fee did pass by the devise; and, 2. That there was not any implied trust of the surplus for the heir, because there was 200 *l.* given to him, which was to no purpose, if the surplus had been intended him.

Which case plainly admits a resulting trust in the heir, unless the intent of the testatrix appeared to dispose it from him. And in this case we may observe, that the question was singly, whether there were any trust at all created, or intended, as to the surplus; but not the least doubt, that if all had not passed, the residue would have gone to the heir.

* And all these cases suppose this ground and rule, that if any * P. 189. part of the trust were undisposed, it was the old trust, descendable to the heir. And the labour of all the contending parties is to shew, that it is, or is not all disposed.

But in the present case there is no question, but that the grantees were bare trustees of the surplus. A trust is here on all hands admitted; it is indeed expressly declared, and our question is only concerning the nature of it, *i. e.* whether descendable, or not?

Now all the before cited cases admit it is descendable, if there be one; for they no where tell the heir, that the trust, if there be any, is not descendable. But the single answer they rest on is, that there is no trust at all.

The Case of *Roper* and *Radcliffe*, &c.

The case of *Coot* versus *Moore*, 22 Jan. 1691. went yet further.

William, Earl of *Meath*, conveyed several manors and lands in *Staffordshire* to the Countess of *Drogheda*, and one *Humphries*, to the use of himself for life, with power to sell, and pay debts, in a schedule, and what other debts he should owe at his death; and to pay the surplus to his daughters, who were his heirs; and afterwards devised his personal estate to his wife.

He sold part of the estate himself, and contracted for sale of other part thereof, and died; and 17 Julii 1655. upon a bill of the purchasers to have their purchase perfected, it was declared, that the personal estate ought to be applied in aid of the real estate for the benefit of the heirs. And afterwards on a bill by Sir *P. Coot*, who married the Lady *Eliz.* one of the daughters, and the said Lady his wife; and by the Lady *Catharine Brabazon*, the other daughter, on the 27 Jan. it was decreed, that the particular estate should be applied to exonerate the real estate in favour of the heirs at law; and yet there was no real estate but this surplus, which was looked upon to be a real estate. And this decree was affirmed in the house of Peers in 1692. (Note, the division of the house was equal). And I observe from the printed case which I have seen, that that which the appellant relied upon was,

1. The constant intention of the Earl, that the Countess should have the personal estate.
2. That the trust estate was expressly charged with debts.

But nothing was urged, that it was not an inheritance.

* P. 190. * And I take it to be the constant received opinion in this court, that this sort of trust is inheritable.

1. Now suppose the trust had been, to raise the several sums out of the profits, and to pay the residue of the profits to him and his heirs; no doubt but this had been part of the antient trust, and inheritable, and would descend to his heir. And the trust to sell, as I before observed, is but a power till executed; and the trust differs nothing from that in the mean time.

2. Suppose a man seised in fee gives power to his executors to sell his lands, &c. and to pay the money or surplus to his heirs; he there has power over the legal estate, as here he has over the trust; but till that power be executed, the old fee descends to the heir; and when it is executed, then arises a trust in the money in lieu of that in the land, which is now sold and turned into money.

As in the case of *Abbot* and *Burton*, in *C. B.* before-mentioned, *A.* conveys her lands to several particular uses; and after the particular estates ended, to the use of her and her heirs, with power to appoint the same to such persons, and for such estates, as she should think fit, till such appointment made; here the use to her and her heirs is, no doubt, the old use; and if not directed by an appoint-

The Case of *Roper* and *Radcliffe*, &c.

appointment, shall descend to her heir; and if the land came from the part of the mother, shall descend to the heir of the part of the mother.

3. I observe some part of the land in the deed belonged formerly to Dame *Dorothy Drummond*, who was *J. Roper's* mother's mother: and then if they descended to him from her, and he had made no will or codicil, but the trust, according to the limitation in the deed, had been to the heir; I would be glad to know what heir would have had it. Would it not have been the same heir who would have taken the lands if they had not been charged? no doubt such a resulting use, a use limited by him, to him and his heirs, would have gone to the heir on the part of the mother. And surely the trust of the same lands, being so much of the same trust undisposed, must have gone the same way.

4. I take it, that the trust, if not devised away, would have been assets by descent in the hands of the heir, upon the statute of frauds and perjuries.

5. That when it is so devised, the heir is so far disinherited, and the devisee put in his place.

6. That a devise of all his personal estate would not pass it, &c.

* This is the nature of it, as it stood in *J. Roper* himself; and * P. 191. I take it, that upon the devise here it is no way altered. Here is no alteration appointed.

I think it would have made no difference, if he had given it by way of appointment. But here it is given as part of *J. Roper's* estate, and consequently not being any part of his personal estate, it must be real. By the will it is given by the name of the residue of his real estate, and in the codicil it is called his remainder in the land.

So that the devisees (if the devise be good) have the trust (in the lands).

1. As it was in *J. Roper*: and, 2. As it would have been in his heir: and therefore,

1. An hereditament. 2. A descendable trust in the land.

I shall now in the next place consider the consequence, if this case should be construed to be out of the act of parliament.

I think it has been rightly observed by the counsel for the plaintiffs at the bar, and by all who have spoken to it on the bench, that the design of the makers of this law, was, 1. To get the lands of this kingdom out of the hands of papists; and therefore it lay difficulties upon them in keeping of their lands, in order to induce them to sell them. And, 2dly, To prevent them from making any new acquisition.

The Case of *Roper* and *Radcliffe*, &c.

I agree likewise, that the reason of the parliament in forming this design probably was, that they looked upon the landed interest to be the strength of *England*. For that such interests and estates in lands give great authority and influence over their particular tenants, and other dependants.

That it might influence elections to parliaments, if papists, &c. have power to make their tenants freeholders, or to accommodate with their lands such as had no freeholds of their own, by some other title.

And I observe, that in many of the western manors (some of these perhaps are of that sort) the tenants are frequently freeholders, or have other rights of voting (in corporations, &c.)

In short therefore, the law makers seem to have esteemed estates
* P. 192. and interests in lands to be weapons, which * papists, when they had them in their hands, made use of against the publick and the government.

I observe likewise, that they have expressly and particularly provided against terms made to papists; so that by the express words of the act, a term for two years; nay, for ought I can see, a term for one year, or for any certain time, is prevented from being made to papists.

It seems, they thought an interest of so short a continuance (tho' not of so great mischief or danger as an inheritance) was yet of some mischief, and so much as to deserve a remedy.

And I observe, that the trust of a term is as much within the act as a legal interest in the term; and that the estate in the hands of the trustees of a papist is of the same consideration, as while it is in his own hands.

Let us now consider a trust of this sort as is here devised, and see what difference there will be between this and the most direct trust in land, or any the most open and notorious term or estate in land. And to me it seems plain, that there will be the same influence over tenants and others, as in the case of a direct ownership.

We are now upon the nature of a trust in general, and not upon the particular circumstances of this case; so that a greater or lesser estate, a greater or lesser charge, a greater or lesser surplus, will make no difference in this point, whether within the act, or not?

Suppose an estate of 1000 *l.* *per annum* is conveyed to trustees, on trust to sell and pay off 3000 *l.* and a papist has a right to the surplus. The management of such sale falls naturally into the hands of himself. And the insolvency of tenants, or smallness of the rents, is only his loss. And the sinking of the debts, and increasing the surplus, is to his only benefit; therefore the putting in, or out of tenants, agreeing upon the terms and rents, and forbearing, arresting, or distraining the tenants, &c. will of course be according to his pleasure. Also,

The Case of *Roper* and *Radcliffe*, &c.

The trustees are his friends, and therefore named trustees for him: and they willingly and most safely leave it to his management; nor can they safely interpose or act otherwise, (than he desires) without hazard and trouble. But,

Suppose the management were in the trustees, yet they are the trustees of a papist, and for his benefit, which is equally within the act.

* (1.) Well, but say they, the sale will put an end to this, so * P. 193. that it can be of no long continuance.

Answ. Any term, as I have said, is within the act, as for a single year, perhaps for half a year, certainly for two years. And this in the nature of it must exceed that time. For it must wait some time, either to meet with the best chapmen; or to get the best price.

And this is to be for every parcel or part.

So that here is no certainty, nor even probability of the ending of this trust in many years.

(2.) It is said he is only a tenant at will to the trustees, and they may sell without him.

Answ. He is indeed but tenant at will to them; but they have no will but his.

Which way then can a sale be expected without his consent? For,

1. The trustees are his friends, and they (or he) may either disparage the title, or object to the price, or pretend better bidders; or may say, it is unreasonable, or that they will have a better price, &c.

2. As to the *executors* and *legatees*, if they press the sale, it is but giving them ample security; they may be made easy with interest, &c. And if there be no other way, it is but to get a friend to advance the money, and all will be easy.

3. But you will say, the *Chancery* will set all right, *i. e.* order a sale of the land, and turn it into money. But, how shall it come there when all the parties are made easy, *viz.* The executors and legatees are secured or satisfied; and the heir of him that made the conveyance will declare, 1. That he has no interest. 2. That the conveyance in trust is good; and 3. That the trust is not within the act. And in the end must only pay costs, if decreed against him. And,

4. As to the *next protestant* of kin, &c. should he come to pray a sale of part, and to have the profits of the residue, &c. In that case no court may decree the whole to be sold. So he will fare no better.

1. But we will suppose it depending in *Chancery* (which may be a long time first, and longer before it come before a master, and

The Case of *Roper* and *Radcliffe*, &c.

longer still before a decree); yet fair bidders may be wearied, &c. by bidders of their own, and (if these will be sturdy) out-bid at last: * P. 194. and (where no body's interest is to * follow it) easily fly off; or if they do not, yet the papists paying their own money, receive it again themselves, and take a conveyance in the name of their own trustees: and if this be undiscovered, all is well; or if it be discovered the conveyance, it is true, is void by the act; but then it reverts again in the first owner or trustees: and the consequence is, that

They are to begin the same round again; nor can I see any end this way, where it is no body's business, interest or inclination to sue; so that the management of the cause may continue for ages. To which no end is likely to be put.

2. But suppose the 3000 *l.* debts and legacies paid by perception of the profits before there can be a sale; or suppose he that has the surplus buys them off (as he may well do, if they are not within the act). And if by either of the said ways he becomes the single owner of the said trust: what is the nature of his interest now?

He has now the entire trust of the land, the rents are merely his, &c. Has he yet no interest or profit out of the land? who shall have the management or power over the tenants? if not himself. And the estate of the trustees is now not in the least for their own advantage, but for the benefit of papists.

3. This will open a way, not only for a papist to take by devise, but to buy or purchase this sort of ownership of others; for what is not within the act may as well be bought as given. Which sort of exposition will, I apprehend, overturn the act, and will have no other effect, but that some very learned and ingenious gentlemen, who attend here upon this occasion, must, or will for the future, dress up their trusts in a new form.

I own, with me, it is a difficulty to say, that such a trust as this, is neither tenement, hereditament, estate, term, nor any other interest or profit whatsoever out of land; and I know not whether, to shut this out of the act, I must not go further and say, that this estate in fee in the trustees is not any land, tenement, hereditament, or any interest or profit whatsoever. For, if it be any of these, it is plainly in trust for the benefit of persons professing the popish religion, and therefore within the clause and provision of this act.

To prove this not to be within the act, great variety of arguments * P. 195. have been used. And they say, that the arguments * on the other side prove too much, and tend to great hardships, viz.

1. That this would disable a papist to make provision for his younger children, if such a trust to make or raise their portions were void.

2. That it would avoid a provision for *papish executors*, &c. and they would therefore distinguish upon the act, and say,

The Case of *Roper* and *Radcliffe*, &c.

3. That the act only intends the continuing of estates in papists, and that here all is to be sold, and by consequence there is no continuing interest in the land.

4. That the act only intends real estates, but that this is money, and merely personal; and as an instance say, a mortgage in fee till foreclosed, the money is in equity personal estate, and shall go to the executors.

5. That estate, term, interest, and profit out of land, mean only perception of profits, and not money to be raised by sale of the land.

And they argued further and said,

6. That a man may sell his land, and give the money to a papist; and therefore he may appoint another to sell it, and to give the money, &c. *Qui facit per alium, facit per se.*

7. That this answers the intent of the act, to turn popish lands into money.

Before I answer these particulars, I would observe in general.

1. That the arguments used of the hardships to papists are of little force against an act of parliament, which is professedly intended to bring hardships upon them.

2. That the distinctions which have been offered do not arise from any words in the act, but from some guesses at what may be thought too hard or unfit, which I think cannot controul the express words; for that would indeed be repealing the act instead of construing it.

3. That the words in this act are contrived on purpose to exclude all distinction, and seem very strong for that purpose, viz. *All estates, terms, or any other interest or profit whatsoever out of land.* So that, let it be long or short, permanent or transitory, descendable or testamentary, of what nature or kind soever, or whatever interest or profit it be, if it come out of land, it seems comprised within the express words of this act.

4. That if this be a descendable interest, as I have endeavoured to shew, all those arguments fall; tho' I shall endeavour * to shew * P. 196. them insufficient, were it no descendable interest.

5. That in no case is any distinction to be admitted in expounding an act of parliament, which opens a way to destroy the act; as I think this would.

So that should I not satisfactorily remove all the difficulties objected, yet they would not be of weight to alter the words and natural construction of the act.

But

The Case of *Roper* and *Radcliffe*, &c.

But to the forgoing objections I give these particular answers, *viz.*

1. The act does not disable a papist from making any provision for his younger children, which they are enabled to take; but those which they cannot take, he cannot make for them; as a rent-charge, or a lease of lands, and as I conceive, a trust of lands.

But what is the consequence of this? that they must not be provided for? no, but must be provided for in a proper method, *i. e.* Let him give them money; if he has it not, why does he pretend to keep his land when he wants money for the occasions of his family.

This is a proper method to attain one end of the act, *i. e.* To work papists out of their lands; and putting a necessity upon them to sell, is agreeable to the end and design of the act. If he sells the land or interest therein himself, it is certainly done; but if he raise a trust, it will perhaps never be done, or paid off by the popish heir, &c.

So that this is so far from being an objection, that it is an argument that the act should extend to it.

2. As to popish executors, &c.

Answ. They cannot take lease or grant, and consequently not mortgage. This is within the express words of the act; for it is an interest in land; and on non-payment the estate is absolute in law; and his interest is good in equity to intitle him to receive and enjoy the profits till redemption or satisfaction; and on a foreclosure he has the absolute estate both in law and equity.

2. That the hardship is to persons the law intended a hardship to.

3. That it is not so hard as to avoid any purchase. For it is what was not contracted for, or relied upon.

* P. 197. * 3. *It is said* the act only extends to continuing estates, &c.

Answ. 1. No such distinction is in the act, which says all estates and interests whatsoever. 2. This may necessitate sales to provide for children, &c. 3. It is a continuing interest. It is true, the sale, when it happens, may determine it, but that alters not the nature of it in the mean time: And how long e're that may be, God knows. It may continue unfold for ever, (and perhaps so intended.)

4. *It is objected*, that the act only intends real estates, and that this is personal, &c.

Answ. 1. No such distinction in the act, nor any words that countenance it; but *econtra*, all terms are expressly within it, which are personal, and go to executors. 2. In a mortgage in fee descended to the heir, and unforeclosed, the heir is a trustee for two persons, *viz.* 1st, For the executor as to the money, which is a particular trust carved out of the whole trust of the fee, like a term for

The Case of *Roper* and *Radcliffe*, &c.

for years out of an inheritance; and, 2. For the mortgagor as to the rest of the trust, who therefore has the inheritance of the trust. But tho' in that case the trust for the executor is not an inheritable trust, yet it is really a (continuing) trust in that land for the mortgagor, tho' of another nature; as he that has a term for years has as really an interest in the land, as he that has the reversion, tho' of another kind; and tho' the one be descendable and the other testamentary, it amounts but to this; it will be money after the sale; and what now affects the land, will by the sale affect the money.

So if a man by will gives power to his executors to sell land and pay the money to his heir, till the sale the heir has a fee therein; tho' when the executors have executed their power, it will be turned into money.

So in *Abbot* and *Barton's* case before cited, there was a power to appoint any estates, even the fee, to other persons; but yet till that was done, and the use limited to the party and her heirs, it was the old use descendable to the heirs on the part of the mother.

But 2dly, All rents and profits of lands, when received, will be money or goods, and yet the right to them before-hand is within the act, and is an interest in the land.

5. *Obj.* That the words, estates, terms, interests, &c. mean only perception of the profits, &c.

Answ. 1. Here is a right to have an account and benefit of rents and profits till sale; and the sale only goes in defeasance * of that right. Now, how far off this sale may be, I know not; and here is a direct power over the tenants in the mean time. * P. 198.

2. What essential difference is there between rent and money on sale, as to the present point? a rent is the price for which the profits of the land are sold for one year, and a fore-hand rent is properly a taking up the profits of land by anticipation; and on a sale all the profits of all future years are sold, and the party receives the price, which is receiving the profits by anticipation; and no distinction is between fore-hand rent and after rent; they are both the profits of the land: profits taken yearly come in all in a lump on a sale; and the right to the one or the other is a right to the profits out of the land.

And therefore, where a trust has been to raise money out of the rents and profits of lands; and the rents are so small, that to raise it by perception of them, would not answer the purpose of the trust; the courts of equity have with great justice decreed a sale, because that is still a raising out of the profits, tho' taken sooner by anticipation.

6. *Obj.* That what a man may do himself he may do by another, &c.

Answ. This rule is right, provided no law hinders; but here the act of parliament hinders; he may receive the rents of his estate

The Case of *Roper and Radcliffe, &c.*

twenty years together, and pay them over to a papist; but can he therefore make a lease to another for twenty years, on trust to receive the rents and pay them over to a papist? the difference is plain; in the one case he creates a trust for a papist, and gives him a right to demand the profits of the land; in the other case the papist receives only the money from him, but never had any demand out of the land.

7. *Obj.* That this will answer the end of the act, *i. e.* turn papists estates into money.

Ans. No. 1. This will defer and prevent doing it. It will deliver him from the necessity of doing it: otherwise he must have done it himself, and then it had been over; but by this way the doing it is delayed, and perhaps it will never be done.

2. This brings the interest of unsold lands to the papist, and creates in him a new interest to the land, and a power over the now tenants.

3. This goes to sell them, not while they are in popish hands, * P. 199. but when they are descended to a protestant heir. * It is in effect a disinheriting a protestant heir, that a papist may have the benefit; which surely was never the intent of the act.

4. This would be the same as if the trust had been created by a protestant: for if this be not an interest within the act, a papist may purchase it from a protestant, as well as have it given him by a papist. Nor will it be material from whom the estate comes.

8. *Obj.* But it may be further said, that all my objections arise from the non-performance of the trust, which is not to be supposed; and that a court of equity ought rather to judge of it as if it were performed.

Ans. My objections arise, 1. From the express words of the act; and, 2. From the manifest inconvenience, if they are departed from.

And as to the supposing a performance, observe:

1. There must necessarily be supposed a time when it was unperformed, or there is no room for a performance; and at that time a papist had a demand out of, and interest in the land.

2. I cannot suppose a trust to be performed, which no body has any necessity, interest or inclination to perform.

3. The trust is to pay out of the profits. Paying out of the yearly rents is no performance in effect. And a sale is the only way to perform it. But that is not done.

9. *Obj.* Well, but a cure may perhaps be proposed for the inconveniencies I have objected; as, that if there appears any fraud, a court of equity will set that right, or they may give another construction in such case.

Ans. We are not here upon a law made to prevent any act in itself fraudulent or injurious; and if so, yet the evading of this would
2 but

The Case of *Roper* and *Radcliffe*, &c.

but occasion the committing of the same fraud another way, and therefore to be met with in the first instance.

Nor are we upon a law which prohibits something under the penalty of a forfeiture to a third person; tho' in that case perhaps a fraud to deprive such person of a title given him by such an act, would be met with.

But this act is a bare disability; and if a man be disabled to purchase one sort of estate or interest, it is no fraud to purchase another sort of interest which he is not disabled to purchase; nor to take care, before he pays his money, * that the seller has an interest of * P. 200. such a nature as he can purchase.

Besides, here he has no stranger to deal with, but simply the person he buys from, who being a party to all that is done, and not surprised or drawn in, but honestly and fully paid, can never complain of fraud.

Nor do I apprehend, that the greater or lesser proportion of the surplus can be material, if the act extend not to an interest of that kind.

Nor can the management of the estate afterwards weigh any thing; for this act creates only a disability, but makes no forfeiture; it prevents a vesting, but divests nothing vested; and if the trust is admitted to be theirs, it is too late to dispute with them about the management of what is their own.

2d Argument. I Am, it seems, in this case, so unfortunate as to differ from some of my brethren; they holding:

1. That this case being on a will, is not with the act: and,
2. That if it were, yet this method will not determine it.

This only opens a way to a further labour to consider, Whether a *gift by will* be within the act, or not? now consider;

1. By the first expression in this clause, *every person being a papist, or professing the popish religion, is disabled to purchase.* And,

2. By the second, *all estates made to any such person are declared void.* And here being in neither expression any reference to any one manner of conveyance, there seems no room for a distinction, whether it be by fine, or by deed, or by will, &c. But here is a general incapacity of all manner of conveyances; and all estates howsoever, or by whomsoever made, are declared void, if made to such persons after such a time.

This seems to me to be the clear sense of the words.

But the objection consists of two parts; if either of which fails, it falls to the ground.

1. It

The Case of *Roper* and *Radcliffe*, &c.

1. It is said that the first expression does not import any disability
* P. 201. to purchase in a proper or legal sense, but only a disability * to purchase for a valuable consideration; which is said to be the vulgar and common sense of the word.

2. That those words which make estates void, if made to such persons, mean not such persons as profess the popish religion (generally), but only such purchasing papists.

And consequently, that the plaintiffs not having paid any valuable consideration; but this trust being given to them freely *by a will*, this case is not within the act of parliament.

I hold both these propositions to be wrong; tho' if either be so the conclusion will fall.

1. First, a purchaser is a law term, and imports any estate which is not cast upon a man by act of law (as descent or escheat). But which he takes or accepts by conveyance for money or other consideration, *vel alia quavis fortuna* (says Sir H. Spelman) or freely of gift (says my Lord Cook expressly) *Litt. fol. 12. 1 Inst. 18. a. b.* And thus it has been constantly used by all lawyers for some hundreds of years without interruption.

Not to multiply particulars, let me instance in the manner of expression of that known rule which is in every lawyer's mouth, as mentioned by that very accurate judge, Lord *Hobart*, in *Counden* and *Clark's* case. *Hob. 30.*

This is a positive rule, that a man cannot raise a fee-simple to his own right heirs, as a purchaser, neither by conveyance of land, nor by use, nor by devise.

Mr. Attorney would seem to imagine a difference between the words to purchase, and to take by purchase; but it is clear they are all one, and the verb to purchase, is constantly used in the same sense as to take by purchase; and in *1 Inst. 2. a. b.* it is used so near a dozen times. And

The general licences to abbies after the statute of *Merton*, are generally only leave to purchase (so are charters to corporations); but no one ever doubted, but that thereby they might take what was given them, as well as what they should buy and pay for.

And here all the conjugates are used in the same sense as the word *purchaser*, which is *nomen verbale*, and being formed from that verb, *to purchase*, it is naturally and properly to be used in that sense.

I will mention but one instance where that word is used in a statute in the same sense (tho' in another form of expression) on the rule before cited out of *Hobart*. It is in *Pybus* and *Mitford's* case.

* P. 202. *1 Vent. 372.* where *Wild*, Just. says, * I agree, a man cannot either by conveyance at common law, limitation of uses, or by devise, make his right heir a purchaser.

Surely

The Case of *Roper* and *Radcliffe*, &c.

Surely laws are to be understood according to the language of the law, and a law term in an act of parliament is to be taken in its legal sense,

Stat. 15 R. 2. c. 5. takes notice, that mayors and commonalty of cities and boroughs, and other towns which have a perpetual commonalty, be as perpetual as people of religion; and therefore, first expressly extends the statute *de religiosis* to them in these terms; from henceforth they shall not purchase to them and their Com', upon pain contained in the said stat. *de relig.*

And it was never doubted, but that it would extend to what should be given to them, as well as to what they should buy.

I agree, that purchasers for valuable consideration have been distinguished from others in several acts of parliament, by provisions made particularly for them, that they should not lose their money; or by exceptions to prevent their being involved in general provisions against fraud; but were never distinguished to their loss or prejudice, nor ever singled out to lose their estates, because they had paid for them. Nor do those acts of parliament, which are in their favour, speak of them as of purchasers generally, but only as of one species of purchasers, *i. e.* purchasers for valuable consideration in express terms; as,

Stat. 27 Eliz. c. 4. against fraudulent and covenous conveyances, sect. 1. recites the loss the subject may have after purchases made, &c. of lands, &c. for money and other good considerations. Sect. 2. makes fraudulent conveyances void against persons who shall purchase for valuable considerations. Sect. 8. makes statutes not entered in due time void against persons who shall purchase for money or good consideration.

Stat. 21 Jac. 1. c. 19. of bankrupts, sect. 14. provides, that no purchaser for good and valuable consideration shall be impeached by that act, unless the commission be sued out within five years. And the statute of frauds and perjuries, sect. 15. is, that judgments, as against purchasers *bona fide* for valuable considerations, of lands to be charged thereby, shall in judgment of law be judgments only from the signing: and, sect. 18. no recognizance * shall bind any * P. 203. land, &c. in behalf of any purchaser *bona fide*, and for valuable consideration, but from the time of the enrolment.

I agree, if a gentleman at the bar were arguing on the stat. 27 Eliz. against a fraudulent conveyance, and should say, that his client was a purchaser, I should understand him to mean a purchaser for a valuable consideration, not because the words *ex vi termini* imports it; but because the occasion of his using it shews that to be his meaning, or he talks nothing to the purpose.

The Case of *Roper* and *Radcliffe*, &c.

But the case is different when we have under consideration the proper sense of the words of an act of parliament; where no declared meaning in any other part of the act determines the intent, but we are to judge upon the enacting part, what they have done, and only thence are to learn their intent, and what they designed to do; for there of necessity the act must be understood always to speak properly, and in the language of the law.

But should I admit, that an act of parliament providing against frauds and artifices to defraud purchasers, is to be confined only to purchasers upon valuable considerations, tho' not so expressed; for that purchasers by free gift can hardly be said to be defrauded in the language of the law; for if the gift be defeated, they are but where they were, and so the subject matter may supply the distinction omitted in the words:

Yet here is no ground or reason for the distinction; it is all one as to the end and intent of this act, whether the lands were paid for, or not.

If the law-makers looked upon lands in papists hands as the support of popery, and to stop the growth thereof, and the mischief the owners might do the publick, thought it reasonable to make provisions against their further acquisitions, is it at all material whether those acquisitions were paid for, or not? 100 *l. per annum* acquired by a papist by a voluntary gift or will, will be as prejudicial to the publick, and as much against this act, as where he has paid 2000 *l.* for it.

Nay, I take it, it will be more so; for then he has the land and keeps his money too, &c. and if he has gotten a new sword, &c. it will do as much execution when given him, as if he paid for it.

* P. 204. * The mischiefs intended to be remedied are the rule whereby acts of parliament are to be expounded, and the words are stretched, if there be occasion to reach them all. But it is very hard to reject the proper, natural and legal sense of the words in any case, much more when it will so plainly let in an equal mischief.

The first statute of mortmain speaks only of religious persons. Now among all the reasons or expositions of those laws, it was never pretended, that paying no consideration excused them.

The stat. 15 R. 2. (*supra*), speaking of lay communities, forbids only purchasers generally; and yet it was plain the law-makers looked on them as equivalent. The conveyance in mortmain was the thing in view, whether a price were paid, or not, and what was the motive was not material.

To give a much stronger instance, the stat. of *Mag. Cbar. c. 32.* (*nallus liber homo debet de cætero amplius, &c.*) expresses both give and sell; but not expressly preventing the mischief to the Lords, it was extended by construction.

Also

The Case of *Roper* and *Radcliffe*, &c.

Also the stat. 18 E. 1. *Quia emptores* enacts, that from thenceforth it shall be lawful for every freeman to sell, &c. Now here was fair room for a distinction, that this statute sets the freeholders free from *Mag. Char.* where they sell, but not where they give; because the stat. only gives liberty to sell, and *Mag. Char.* expressly forbids giving as well as selling; but the act being a provision for the Lord, and the price being between the parties only, and the mischief of giving being the same as to him, it has been extended thereto.

And *Litt. sect.* 40. speaking of this act, says, that it was thereby ordained, that no man should alien, or (give) grant lands or tenements in fee-simple, to hold of himself: and that the word sale extends to gifts. (Q.)

So here the care is for the publick, and to prevent papists from getting new acquisitions. What is paid, is only between the grantor and grantee, but does not concern the publick at all. And therefore, &c. no reason to form a distinction here.

But we are not contending to enlarge the sense of the word (purchase) but only to understand it in its true, genuine, proper, and legal sense. And,

* 3. There is still less room for this distinction, because the subject matter of this clause is properly an incapacity or disability. * P. 205:

“ Acts of parliament are always expounded according to the rules
“ and reason of the common law; and when a provision is made
“ by act of parliament, the law endeavours to range it with some
“ provisions of its own of like nature.

The stat. *de donis* enacts, that tenant in tail *non habeat potest. alienandi terram datam*, so as to prevent its coming to his issue; and that a fine thereof *fit in ipso jure nullus*. Now the end and effect of this stat. is a disability to alien to the prejudice of others; and therefore the law now ranks him with bishops and other ecclesiastical persons, and with husbands, who by the common law were disabled to alien to the prejudice of their successors and wives.

And therefore tho' the act be, that tenant in tail shall not have power to alien, and that his fine shall be void; yet it was construed, that his fine was not void, but made a discontinuance, and put the issue to his formedon; and that his other alienations either put the issue to his action, or allowed his entry, just as the law stood before in relation to bishops.

Now here by this clause an incapacity or disability is brought upon a papist. Then inquire. Has the law any species of incapacity with which to rank this? Yes, for capacity and incapacity to purchase is a settled notion therein, and therefore papists are to be construed to be in the same condition with those, who were under an incapacity to purchase at common law. And whatever distinction

might

The Case of *Roper and Radcliffe, &c.*

might be between one purchaser and another in respect of the consideration and other circumstances; there never yet was any between one incapacity to purchase and another: and a man under such incapacity, was no more capable of lands given him than of lands bought; and if this act be construed according to the reason of the common law, a papist is in the same case.

And upon the whole, I think that the word *purchase* here does by no means make a valuable consideration necessary.

But if there could any doubt remain: yet,

* P. 206. 2. *Secondly*, The later words leave no room for any distinction upon the point of the consideration; they are plainly * more general, and I apprehend more extensive than the former; and therefore if there were any doubt upon the word *purchase*, *i. e.* Whether the larger or narrower sense of the word should be taken, it must now be in the larger sense; because the sense of those later words in the act, is at least as large as the largest sense of the word *purchase*; and there can be no other use of them, but to supply the defect or narrowness of the former words.

Therefore, I shall not contend that it is an independant clause: I content myself to have it admitted to be an explanatory or supplemental clause, as the words therein, *such person or persons*, must be explained to be person or persons professing the popish religion, *i. e.* Such person or persons as are spoken of before.

This is the natural sense; but to construe *such person or persons* to be such purchasing papist, is harsh, and I think not to be supposed either from the grammar or the context; for the word *such* refers to a precedent description, and consequently to the circumstances he is before described by; and not to make words mentioned in his punishment to be a necessary part of his description.

Suppose the first disability had been a disability to sue or bring an action, and the clause had run thus, that all and every papist, or person professing the popish religion, shall be disabled and made incapable to sue or bring an action, and that estates made to such person or persons should be void; would these last words be expounded only of such persons as should sue or bring actions? No surely, the different punishment inflicted can make no difference in the description of the person.

I cannot better illustrate this than by the common method used in passing bills in parliament, *i. e.* To bring them in with blanks for times and penalties. And so this clause in the bill would run, when first brought in, thus:

“ And that from and after——every papist or person professing the popish religion, shall be disabled, and is hereby made incapable, &c.——And that all estates, terms, interests or profits whatsoever out of lands, from and after——to be made, “ suffered,

The Case of *Roper* and *Radcliffe*, &c.

“ suffered, or done, to or for the use, &c. of any *such* person or
“ persons, or upon any trust or confidence, to or for the benefit or
“ behalf of any *such person or persons*, shall, &c.

As it stands here, the words *such person or persons* are plainly
such as are described in the beginning of the clause, and are used to
save the repetition of that which is in the foregoing * description. * P. 207.

Is it possible now to think, that the filling up of the blanks can alter
the description of the persons? and that one sort of persons will
be meant if one punishment be inserted, and another sort if another;
or,

That if the first blank be filled up with a disability to sue, that
the last clause only affects estates granted to plaintiffs; or if with a
disability to bear an office, only estates granted to officers; or if
with a disability to be an executor, only estates granted to execu-
tors?

No! the description was full and compleat at the first; the same
persons are the subjects of both parts of the clause; and whether the
blank be filled up with one sort of punishment, and the second with
another; or whether the second be only an enforcement of the first,
it will be all one.

Besides! If you would refer it to punishment, it should be such
papist as is disabled to purchase, and not such papist purchasing, for
there is no purchasing papist spoken of. But,

The former exposition operates not only upon purchasing papists,
but upon all: all are immediately *ipso facto* disabled, and the act
has its effect upon those who are thereby deterred and restrained
from purchasing, as fully and as properly as upon those who shall
attempt to purchase, and lose; and more agreeable to the intent of
the act, which seems to aim at prevention rather than forfeiture. It
seems then very strange, that the later words should not extend to
all papists too.

In the sense wherein I take them, the later words are very useful
and proper; they enlarge the former words, if they are too short,
or, by using words not so capable of distinction, remove the am-
biguity.

And the present question shews it was very fit to put them in for
that purpose. But in any other sense they are vain, and increase
the doubt instead of removing it.

And to look more narrowly, the word *relief* in the later expression
seems calculated for a gift, as an *estate given or provided* for chil-
dren, relations, or any in want, is properly said to be for their re-
lief: but an estate in land which a man buys can never be said to be
for his relief; he has only altered the nature of his estate, and is not
a jot the richer. Q.

The Case of *Roper* and *Radcliffe*, &c.

* P. 208.

* *Object*. That devises are not within this clause : for that,

1. They are mentioned in the former clause, and dropped in this ; and,
2. If they be, this clause clashes with the former, and makes an absolute disability in the same case where that makes only a qualified one.

Answ. Devises are not dropped in this second clause. It is true, they are not named therein, nor indeed could they be as that clause is penned ; but it is plain they are meant and implied in it.

Had the second clause made all fines, feoffments, grants, releases, &c. to papists void, and had omitted devises ; it might have been justly said, that devises were dropped, or excluded, in it.

But here the general words of this second clause being relative to the former, it is plain devises are included in those relative words, devises being expressly mentioned in the antecedent clause, to which this subsequent does relate.

* The

* The Report of the Attorney and Solicitor General in the Case of *Vernon* versus *Benson*. *Ante* 47. * P. 209.

UPON consideration of the several matters laid before us, we humbly certify your Lordships, that altho' grants or warrants under the King's sign manual, ought regularly to be countersigned by some officer of state, according to the nature and import of such grant or warrant; and that the omission of such countersigning may be some evidence of surprise upon the crown, when there is nothing to account for it: yet we apprehend that suspicion is removed in the present case; the late Earl of *Sunderland* having by letter referred the consideration of this very point to his Majesty's then Attorney General, and the answer to that letter by Sir *Edward Northey*, in which he seems to intimate that there was no necessity, that a warrant granted in pursuance of the proviso in the statute 7 & 8 *W. 3.* abovementioned, should be countersigned: which intimation of his, together with a doubt by what officer it ought to be countersigned, might probably occasion that omission. If the want of being countersigned makes the instrument void; or if the crown had no authority to direct an assignment of the securities, because the 3300*l.* and interest, was discharged by a fall of wood, and not paid in money; we conceive the petitioners may take advantage of these points in the ordinary course of justice.

As to what was insisted on for the petitioners, with regard to the circumstances of their case; and that his Majesty would not have directed an assignment of the said securities to the person now claiming the benefit thereof, if those facts had been laid before his Majesty; but if they were not, we don't think our selves at liberty to judge whether his Majesty would, or would not, have granted such warrant in case they had been represented to him; since we are of opinion he might, by law, have granted it, notwithstanding any of these matters insisted upon for the petitioners.

* *Morgan versus Dillon*. *Ante* 135.

* P. 210.

NOTA. The decree in this case was reversed in the house of Lords upon an appeal, and the Lady *Sbean* confirmed in the guardianship.

Term

Term. Hill. 2 Geo. II.

Southwell *versus* Lord Limerick. Ante 133.

THIS case was solemnly argued before the Lord Chancellor, assisted by the two Chief Justices; and it appearing in the cause, that the defendant had kept the complainant out of an answer; and that the process's of contempt were all run out against him before he answered; the court and judges were unanimous of opinion, that the depositions taken *be bene esse* on the commission formerly issued to examine witnesses, and which were taken before the defendant had answered, should be now read and given in evidence, tho' the defendant lost the benefit of cross-examining.

T A B L E

TO THE

C A S E S in C H A N C E R Y.

A. Abatement. See Plea. Account. AFTER an account stated, the parties were decreed to account again before a master. <i>Page 23. see 153</i> Administrator. See Executor, &c. Affidavits. The practice thereof on granting sequestrations for contempts. 124 Agreements. See Tit. Articles and Covenants. Where an agreement was only by parol, but being confessed in the answer, was decreed to be executed. 86 <i>Note.</i> The agreement was first in writing, but that lost. 86 VOL. IX.	See the particulars of the agreement. <i>Page 87</i> Of special agreements. 88, and see Tit. Articles, Bargains, and Covenants. Of Marriage Agreements. See Tit. Marriage. Age. See Infant. Alimony. See Baron and Feme. Arbitrators and Awards. A hard award not set aside, though made without the knowledge of one of the parties. 63 Articles. See Tit. Agreements <i>supra.</i> Articles for sale of an estate decreed specially to be performed. 151
---	---

The TABLE

Assignee and Assignment.

An assignment of an interest in a lease of lands of 200 l. *per annum* value, in consideration of 20 l. only paid, and upon misinforming the plaintiff, was set aside as obtained by fraud.

Page 83

Attachment. See Tit. Process.

Authorities. See Tit. Powers.

B.

Bargains. See Agreements, &c.

Extravagant bargains not to be carried into execution in a court of equity. 153

Baron and Feme. See Marriage and Curtesy of England.

His estate subjected to her debts.

The husband's estate in the hands of another, subjected to the funeral charges of the wife. 31

Her estate, &c. bound by his acts.

The husband possessed of a long term in right of his wife, made an under-lease for ten years, and on borrowing money of the lessee, covenanted to grant him another lease after the end of the ten years, to continue during the time he had any right, but died before any such lease made; yet decreed this was a good disposal of the wife's interest. 42

The husband being possessed of a term in his wife's right, was divorced

a mensa & thoro; and being about to sell the term, an injunction was granted. Page 43

The wife possessed of a term for years, having married an alien, such marriage is no gift in law to him of the term. 104

See *alimony* decreed to the wife. 6

Bills in general.

Bill amended. 83

Bills dismissed for want of proper parties. 89, &c.

Papists disabled by the statute to bring bills in equity. 33, 34

Bills in particular.

A bill for performance of covenants, &c. See Covenants. 106

A bill to be relieved against a covenant in a lease, as not drawn pursuant to the covenants in an old lease. 58, 59

A bill to be relieved against a verdict in ejectment for not repairing, &c. 90, 91

A bill against a mortgagee to compel him to reconvey on payment of principal, interest and costs. 120, 121

A bill by a protestant heir to recover lands devised by a papist in trust. 154, 155

A bill in the dutchy court for lands: defendant demurred, because not averred that the lands lay within the dutchy, which being a circumscribed jurisdiction, the demurrer was held good. See Courts. 95

See after a decree signed and enrolled, and also exemplified, the plaintiff had relief upon an original bill for the same matter. 6

Bonds.

The T A B L E.

Bonds.

The mother gave a bond to her son, conditioned to surrender a copyhold estate to him, of which she was heir; and decreed she was a trustee thereof for her son. Page 62, 63

The obligor, on payment of 20*l.* to the obligee, procured a bond and notes for money to be delivered up to him, on pretence that he was poor, and nearly related to the obligee; but that not being proved, he was ordered to account for both the bond and notes. 118, 119

C.

Chancery. See Tit. Courts and Relief.

Charities and Charitable Uses.

SEE a decree of the commissioners of charitable uses reversed. 64, 65

Commissioners of Sewers.

They made a wrong assessment, and the complainant by their warrant distrained, for which he was sued. This court would not relieve. 94,

95

Common Recovery. See page 16

Though there was no legal tenant to the *præcipe* in order to suffer a common recovery, yet after length of time it shall be presumed there was a legal tenant. 143

A papist being tenant in tail, suffered a common recovery, and declared

the uses to himself and his heirs; and held, this was not a purchase within the *stat. 11 & 12 W. 3.*

Page 172, 173

Of barring estates-tail by a common recovery. 178

Compositions. See Debts.

Conditions. See Bonds.

Consideration.

What may be a good consideration, or not. See 83, 84

The force and extent of consideration of marriage. 132

Contempts. See Tit. Process.

Contracts. See Infant.

Copyholds. See Tit. Bonds and Covenants, and page 75.

Costs.

Parishioners ordered to pay costs on a suit for tithes. 118

Covenants.

A covenant, that if the estate was to be sold, the mortgagee should have the benefit of pre-emption, but not being claimed before the estate was sold, the benefit of the covenant was lost. 2, 3

A man covenanted for himself and his heirs to surrender a copyhold estate to such uses, and died before it was done; but on a bill against the heir for a special execution of the covenant, it was decreed accordingly. 106, 107

Lessee

The T A B L E.

Lessee for years covenants not to alien without licence of the lessor, under penalty of forfeiting the lease; if he after aliens without licence, equity will not relieve him. Page

112, 123

Of covenants to stand seised to uses, &c. See 162, &c.

Courts.

Court of Chancery, its jurisdiction, &c. See Tit. Bills, Jurisdiction, Relief.

Court of Exchequer. A decree was in the court of Exchequer against tenant for life, to hinder him from committing waste, which decree was founded on a deed of settlement; and on a bill in Chancery to set that deed aside, the defendant pleaded the decree in the Exchequer, but was over-ruled. 109, 110

Dutchy court. A bill in the Dutchy court for lands demurred to, because it did not aver that the lands lay within the dutchy, it being a circumscribed jurisdiction. 95

Curtesy of England.

Where the husband shall be tenant by the curtesy of *England*, or not.

147 to 151

Devise to the wife for life, remainder to the issue male of her body, and to the heirs male of such issue male, remainder over: she had issue a son, who died in her life, and then she dies, but being heir at law to the testator, the reversion in fee descended on her, and yet decreed her husband should not be tenant by curtesy. 148

Customs of London, &c.

A freeman of *London* having one daughter, and several grandchildren by her, devised his personal estate to pay debts and legacies; and afterwards what remained to be sold, and the interest of the money to be paid to his said grandchildren, share and share alike till of age, but did not dispose the principal sum, which the daughter and her husband claim by their bill. Page 57, 58

D.

Debts, Debtors and Creditors.

A Goldsmith's Note given in part of payment on *Saturday*, but not offered to the drawer till *Monday* following, is no new credit given to the drawer, but the indorser is still liable. 60

A creditor cannot sue one co-executor alone without the other. 89

The obligor on payment of 20*l.* to the obligee, procured a bond and notes for money to be delivered up to him, on pretence he was poor and nearly related to the obligee; but that pretence not being proved, he was ordered to account for the bond and notes. 118, 119

Lands given in trust, or devised to pay debts and legacies, to be deemed as money in respect to creditors, but not in respect to the heir at law or residuary legatee. 171

See Tit. Decree.

Decree.

An infant bound by decree. 153

A pro-

The T A B L E.

A promise, though not in writing, decreed to be performed. Page 63, 86

Pending a suit by the creditors against the mortgagor to sell, &c. the mortgagee got a decree to foreclose; but decreed the mortgagor and creditors might redeem on payment of principal, interest and costs, and that the lands should be sold to pay the creditors. 153

See a decree made in the Exchequer pleaded in Chancery, and overruled. 109, 110

An agreement in writing lost, but confessed in the answer, decreed to be executed. 86

See a decree of commissioners of charitable uses reversed in Chancery. 64, 65

Deeds and Conveyances.

An agreement in writing being lost, but confessed in the answer, ordered to be executed. 86

Deeds were ordered to be brought into court to be inspected by the plaintiff, in order to make out his title. 99

The defects of deeds supplied in equity. See 63, 86, 152

One covenants by deed to surrender a copyhold, but dies before the surrender made; but decreed the heir should surrender. 106, 107

So articles for sale of an estate were decreed to be performed. 151, 152

Demurrers.

Demurrer to a bill in the Dutchy court, that it did not aver that the lands lay within the dutchy, allowed. 95

Vol. IX.

Depositions.

See depositions taken *de bene esse* before the defendant had answered, or issue joined. Page 133

Devises, Wills, &c.

A devise to the eldest son of his eldest son in tail male, and for want of such issue to his second son in tail male, he shall take immediately. 4, 5

A devise of a term of years to the mother for life, remainder to the daughter, is an executory devise. 102. See page 28

Lands devised to his wife and her heirs, to be sold for payment of debts and legacies in aid of the personal estate, and not being sold, if the personal estate is sufficient to pay the whole, the heir shall have the land as a resulting trust. 122 to 124

Lands given in trust, or devised to pay debts and legacies, shall be deemed as money in respect to creditors, but not in respect to the heir at law, or residuary legatee. 171

By a devise of the *residuum*, the inheritance passes. 92

Devise of a legacy to his grandchildren, if they arrive at 21, or marry. See 93

Devise to the mother for life, remainder to her children: she had then one child, and about four years after he makes a codicil, when she had two children more, who died. They all took an estate in fee as tenants in common. 104, 105

Where a will shall not be revoked by a codicil, &c. 68, 70, 71

B b b

Devise,

The TABLE.

Devise, that he did not doubt but his wife would be kind to his children, is void for incertainty. *Page*

122, 123

The husband devised his real estate to his three daughters and their heirs, and then by a codicil devised it to his wife, if his three children should die without issue, and made her guardian to the children, she married again, the guardianship was taken from her by the court. 135,

136

The mortgagee had a term for 500 years, and after took another term of the same lands for 1000 years in the name of a third person, to commence after the determination of the first term, and then purchases the fee-simple in his own name; and then devised the lands to E. G. for life, remainder in tail, &c. this will was void as to pass the lands, because not attested by three witnesses: but then it was insisted that it was good for the 1000 years as a term in gross: but it was decreed to be a term attending on the inheritance by implication of law, &c. 124, 125

Contradictory clauses in a will shall be so expounded as to make all consist. 154

A will shall not be established against an heir at law, without a trial at common law. 90

Where collateral proof shall be admitted to shew the intent of the testator. 9, 156. See Executors.

Dower.

Dower cannot be barred but by an express intention of the parties. 152

Dutchy. See Tit. Court.

E.

Enrolment. See Tit. Decree.

Error. See Writ.

Estates. See *Devises and Limitations.*

A Term for years is a less estate than an estate for life, and why it is so. *Page* 102

A wife possessed of a term, by marrying an alien, does not invest him in her estate. 104

A devise to the mother for life, remainder to her children. &c. she having then but one child; about four years after, when she had two more (who after died) he makes a codicil to the will, and held that all the children had an estate in fee as tenants in common. 104, 105

A papist tenant in tail suffered a common recovery, and declared the uses to himself and his heirs; this is not a purchase within 11 & 12 W. 3. for it is no acquisition of a new estate, but only a modification of the old family estate. 172, 173

The personal estate must come in aid of the real. 66

Estates-tail barred. See Tit. Common Recovery, and page 179

Evidence.

The exemplification of a sentence given in a foreign nation shall be read as evidence here, that such sentence

The T A B L E.

sentence was given there, without further proof. *Page 66*

Where collateral proof shall be admitted to shew the testator's intent. 9, 11

Executors and Administrators.

An executor having a specifick legacy devised to him, is a trustee for the residuary part. 9

Where an executor shall have the residuary part free from any distribution. 11

Where an executor hath no specifick legacy devised to him, he shall have the *residuum* after debts and legacies paid. 27, 28

The personal estate in the hands of executors, &c. must come in aid of the real. 66

Exemplification. See Tit. Decree and Evidence.

Exchequer. See Tit. Courts.

F.

Fees. See Deeds, Fines, &c.

Fines.

Of fines levied and uses declared thereupon, see 162, 163. and

Tit. Common Recoveries.

Foreclosure. See Mortgage.

Frauds. See Bargains, Deeds, &c.

An unreasonable marriage settlement not to be set aside except a fraud be proved, &c. 80, 81

An assignment of a lease of lands of 200 l. value, set aside as obtained by fraud. *Page 83, 84*

Where a mortgagee helps to carry on a fraud, his mortgage shall be set aside. 96, 97

G.

Guardians, &c.

THE guardianship of an infant is not assignable over to another. 40

Where one was reported by a master to be a fit guardian to a natural child, yet such guardian was not allowed, but placed with the father, who owned her. 116, 117

The husband made his wife guardian to his children, &c. but she marrying again, the guardianship was taken from her by order of court. 135

H.

Heir.

THE heir favoured in equity. See page 32, 90, 122, 157, 159, 171

Lands were settled in marriage on trustees, &c. that if the wife survived, she should receive the profits as they were then let. The husband made leases and advanced the rent; and decreed, that the heir at law should have the advanced rent. 32

A will not to be established against an heir without a trial at law. 90

Lands devised to the wife to be sold to pay debts, &c. not being sold, if the personal estate will pay the debts, the heir shall have the whole lands. 122

The TABLE.

A tenant in common dying in the life of the testator, his moiety will descend to the heir at law. *Page* 157

See 159

Lands given in trust, or devised to pay debts, &c. shall be deemed as money in respect to the creditors, but not in respect to the heir at law. 171

Husband and Wife. See Tit. Baron and Feme.

I.

Ideots.

AN information against one for contriving to marry a woman to an ideot. 98

Implication. See Tit. Devise.

Incumbrances. See Tit. Securities.

Infants. See Tit. Guardians.

A contract made by an infant with consent of his friends, is good. 103, 104

An infant decreed to join in a conveyance within six months after he comes of age. 153

Intention.

Where collateral proof shall be admitted to shew the intent of the testator. 9

Jointenants and Tenants in Common.

What words in a devise shall make a tenancy in common. 157, 158

Ireland.

Where process of the Chancery here will not affect lands in Ireland. *Page* 125

Judges Certificate.

Where a reference is to the Judges on a case stated, no writ of error lies on their judgment: but if they certify their reasons, the court may consider of it. 5

Jurisdiction. See Courts.

L.

Leases. See Covenants.

Legacies. See Devises.

WHERE a legacy is to be paid out of lands at such a time, if the legatee die before the day, the legacy is lost: but *aliter* if out of the personal estate. 106

Letters Patent. See Patent.

Limitations of Estates. See Deeds and Devises.

See the limitations in the deeds of settlement of Sir John Trevor's estate. 161, 162, &c.

Limitations, the Statute. See Title Statute.

London. See Customs of London.

M. Bar.

The T A B L E.

M.

Marriage and Marriage Settlements. See Agreements, Baron and Feme, and Limitations.

SEE an information against a person for contriving the marriage of an idiot. Page 98

A foreigner who marries a subject of England attainted of treason shall forfeit her portion to the King. 100

By marriage-articles the eldest son was made tenant in tail; *proviso*, that the father might sell the lands by consent of the trustees, and purchase other lands, and settle them to the like uses; he purchased other lands, but did not settle to like uses, yet good. 128

Lands were settled in marriage on trustees, &c. that if the wife survived, she should receive the profits as they were then let; the husband made leases and advanced the rent: decreed, the heir shall have the advanced rent. 32, 33

An unreasonable marriage-settlement shall not be set aside, there being no fraud proved, or incapacity in the husband. 80

The father agreed to give his daughter 3000*l.* as a marriage-portion; but having devised to her only 2000*l.* died before the marriage, the husband shall not have the other 1000*l.* 3, 4

See the articles on Sir John Trevor's marriage decreed. 161, 162, &c.

Mortgages, Mortgages, &c. See Tit. Devise, Fraud.

A mortgagee cannot make a lease of a house in mortgage before a fore-

VOL. IX.

closure, nor present on an avoidance. Page 1

The subsequent mortgagee prays to redeem the first mortgage on payment of what was due, and pending that suit the first mortgagee sets up another mortgage prior to them all; and a trial at law was decreed, whether that mortgage was executed; and if it was, how much money was due on it. 38, 39

A bill against the mortgagee to compel him to reconvey on payment of principal and interest. 120

The mortgagee had a term of 500 years, and after took another of 1000 years. See Tit. Devise.

Note; Pending a suit by the creditors against the mortgagor to sell, the mortgagee got a decree to foreclose. 153

Oath. See Affidavit.

P.

Papists.

WHERE papists are disabled by the *stat. 11 & 12 W. 3.* to bring their bill in equity. 33, 34

Whether a monk professed is capable of taking an estate. 55, 56

Devise of a term in trust for a papist, void. 146, 147

A bill by a protestant heir to recover lands devised by a papist in trust. 154, 155

Devise of lands to a papist is a purchase within the *stat. 11 & 12 W. 3. c. 4.* 155, 167, &c.

But where a papist being tenant in tail, suffers a common recovery, and declares the uses to himself and his heirs, this is no purchase within that statute. 172, 173. *Vide ibid.*

C c c

Parol.

The TABLE.

Parol. See Tit. Agreement.

Patents.

Payment. See D. lts.

Penalty. See Bond.

Pleas.

The statute of limitations is no good plea where the estate in law is in trustees. Page 33

See a decree in the Exchequer pleaded, but over-ruled. 109, 110

Portions and Provisions for Children.

See Title Marriage Settlements, and page 161, 162, &c.

Power.

A power to act according to discretion. 11

Defective powers made good. 12, 13

Process.

Where process of this court will not affect lands in Ireland, so as to sequester them for a contempt. 124

Proof. See Tit. Evidence.

Purchaser, &c.

Who is a purchaser, and what a purchase. See 175, 176, 177

Where a person, knowing his own title, does not give notice of it to a purchaser, he shall never set it up against the purchase. 35

R.

Recovery. See Tit. Common Recovery.

References. See Tit. Judges.

Relief in Chancery. See Tit. Devise, Legacy, &c.

SEE relief granted after a decree signed, enrolled and exemplified. Page 6

Defective powers relieved in equity. 12

An agreement in writing lost, (but confessed by answer) made good. 86

Relief granted against a covenant in a lease, it not being drawn pursuant to the covenants in an old lease. 58, 59

Quare if relief may be against a verdict in ejectment. 90, 91

Cases denied relief.

A hard award not relieved, though made without the knowledge of one of the parties. 63, 64

Where a legacy is to be paid out of lands at a time certain, if the legatee dies before. 106

An unreasonable marriage-settlement denied relief. 80

Lessee for years covenants not to alien without licence, under penalty of forfeiting his lease; if he breaks his covenant, equity will not relieve him. 112, 113

Extravagant bargains not to be carried into execution in equity. 152, 153

Remainders.

The TABLE.

Remainders. See Tit. Deeds, Limitations, and Marriage Settlements.

Rent.

The lessor died on the very day the rent was payable, and held not to be due till the last minute of that day. Page 21

Residuum. See Tit. Executor.

Revocation. See Tit. Wills.

S.

Sequestration. See Tit. Process.

Sewers. See Tit. Commissioners.

Sign Manual.

A Sign manual not countersigned by the lords of the treasury, or a secretary of state, is not good. 47, 48

Statutes.

The statute of limitations pleaded and disallowed. 33

The stat. 12 Car. 2. of appointing testamentary guardians to infants. 136, 137

The stat. 29 Car. 2. c. 3. That all declarations or creations of trust shall be in writing signed by the party, &c. explained. 72, 73

The stat. 11 & 12 W. 3. against papists purchasing estates explained. 155,

See Tit. Papists, and page 155, 156, 167, 168, 173

T.

Tenants in Common. See Tit. Jointenants.

Tenant by Curtesy. See Tit. Curtesy, &c.

Tenant for Years. See Estates.

Treasury. See Sign Manual.

Trover.

IN trover for an annuity-ticket, the plaintiff was nonsuit. Page 44, 45

Trusts.

Are to be declared in writing signed by the party, by statute 29 Car. 2. 72, 73

For devises of lands, &c. in trust; See Tit. Devise, and 29, 122

Where one insisted on an absolute gift, but it appeared to be in trust. 113, 114

Where the heir shall have the land as a resulting trust, notwithstanding a devise. 122, 123

Where lands given in trust shall be deemed as money, or not. 171

See of Devises in trust for papists, &c. Tit. Papist.

Tythes.

Tythes of hay ought to be paid in grass-cocks. 117, 118

V.

The T A B L E.

V.

Verdict.

SEE relief after a verdict. Page 90, 91

Uses.

Of devises and settlements to uses, see page 4, 5, 162, and Tit. Devise and Marriage Settlements.

Of declaring uses on a fine or common recovery. 176, 177, &c.

W.

Waste.

A Decree in the Exchequer for restraining Waste pleaded, &c. 109, 110

Wills. See Tit. Devises.

Making a second will is a revocation of the first; and after the probate of the first was confirmed by the delegates, a commission of review was granted. Page 7, 8

A will not to be established against an heir at law, without a trial at law. 90

A will not attested by three witnesses, is void as to lands, but may be good to pass a term of years. Q. 124, 125

Contradictory clauses in a will are to be so expounded, as that the whole may consist. 154

Writs. See Tit. Process.

Where a reference is to the judges on a case stated, no writ of error will lie. 5



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